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No. _____

In The

Supreme Court of the United States

October Term, 1998

BSW DEVELOPMENT GROUP,

Petitioner,

vs.

CITY OF DAYTON, OHIO,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When faced with this Court's doctrine that a 5th Amendment taking occurs when government regulation prevents a property owner from making *economically viable, productive, or beneficial* use of land, may a state court replace that standard with one that requires denial of *all* use of the property, even if the remaining "use" is not economically productive? When the Ohio courts so held, they created conflict with the decisions not only of this Court, but of numerous other state courts.

2. Is the substantive standard for a temporary regulatory taking – aside from its temporal quality – different from the standard for a permanent regulatory taking? When the Ohio courts held it was, they created conflict with the decisions not only of this Court, but of numerous other state courts.

3. Is the right to demolish an unusable, dilapidated building, and develop the underlying property productively and in a manner that meets the owners reasonable, investment-backed expectations, a constitutionally protected "stick in the bundle of property rights?" When the Ohio Supreme Court held it was not, it created a direct conflict with the New York Court of Appeals.

LIST OF PARTIES

The Petitioner BSW Development Group is a partnership consisting of Dwight D. Brannon, William I. Schoenfeld, and Dennis Williams.

Respondent City of Dayton, Ohio, is an Ohio municipal corporation.

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	9
REASONS FOR GRANTING THE WRIT	14
I. THERE IS CONFUSION IN THE LOWER COURTS ABOUT THE MEANING OF "ECONOMICALLY VIABLE USE" OF PROPERTY	14
II. LOGICALLY, THERE CAN BE ONLY ONE SUBSTANTIVE STANDARD FOR A TAKING, WHETHER IT IS PERMANENT OR TEMPORARY, BUT THERE IS CONFLICT IN THE LOWER COURTS	20
III. THERE IS CONFLICT BETWEEN OHIO AND NEW YORK ON WHETHER THE RIGHT OF A BUILDING OWNER TO DEMOLISH A DERELICT BUILDING AND REBUILD ON THE SITE IS A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT	26
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

614 Company v. Minneapolis Community Dev. Agency, 547 N.W.2d 400 (Minn. App. 1996) 11, 12, 16, 19, 24

Agins v. City of Tiburon, 447 U.S. 255 (1980) 14

Alexander v. Town of Jupiter, 640 So.2d 79 (Fla. App. 1994) 24

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 7, 8

Corrigan v. City of Scottsdale, 720 P.2d 528 (Ariz. App. 1985) 17

Cumberland Farms, Inc. v. Town of Groton, 247 Conn. 196 (Conn. 1998) 12, 23, 24, 25

Dolan v. City of Tigard, 512 U.S. 374 (1994) ... 13, 15, 19

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) ..... *passim*

Golf Club of Plantation, Inc. v. City of Plantation, 717 So.2d 166 (Fla. App. 1998) 11

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981) 15

Hornstein v. Barry, 530 A.2d 1177 (D.C. App. 1987) 17

Kaiser Aetna v. U.S., 444 U.S. 164 (1979) 14, 28, 29

Kempf v. City of Iowa City, 402 N.W.2d 393 (Iowa 1987) 11, 17

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) 9, 15, 18

TABLE OF AUTHORITIES – Continued

Page

Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984) 15

Lake Nacimiento Ranch Co. v. San Luis Obispo County, 841 F.2d 872 (9th Cir. 1987) 15

Landgate, Inc. v. California Coastal Commn., 953 P.2d 1188 (1998) 23

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 28

Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992) 12, 23

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 9, 13, 15, 18, 23

McQueen v. South Carolina Coastal Council, 496 S.E.2d 643 (S.C. App. 1998) 16

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 17

Nollan v. California Coastal Commn., 483 U.S. 825 (1987) 9, 15, 26

Orion Corp. v. State, 747 P.2d 1062 (Wash. 1987) 17

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 14, 18, 29

Port Clinton Associates v. Board of Selectmen, 587 A.2d 126 (Conn. 1991) 12

Ranch 57 v. City of Yuma, 731 P.2d 113 (Ariz. 1986) 17

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) ..28, 29

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 14

TABLE OF AUTHORITIES – Continued

Page

Schad v. Borough of Mount Ephraim, 452 U.S. 61, (1981) 14

Seawall Associates v. City of New York, 542 N.E.2d 1059 (1989) 12, 13, 27, 28

Sintra, Inc. v. City of Seattle, 829 P.2d 765 (Wash. 1992) 12, 23

Standard Materials, Inc. v. City of Slidell, 700 So.2d 975 (La. App. 1997) 12, 22

State ex rel. BSW Development Group v. City of Dayton, 83 Ohio St. 3d 338, 699 N.E.2d 1271 (Ohio 1998) 1

Steel v. Cape Corp., 677 A.2d 634 (Md. App. 1996) 17

Steen v. County Council, 76 A.2d 642 (Del. Ch. 1989) 12, 22

Suitum v. Tahoe Reg. Plan. Agency, 520 U.S. 725, 137 L.Ed.2d 980 (1997) 15

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) 15

Wheeler v. City of Pleasant Grove, 833 F.2d 167 (11th Cir. 1987) 17

Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401 (Neb. 1994) 12, 23, 24

Williamson County Reg. Plan Commn. v. Hamilton Bank, 473 U.S. 172 (1985) 11, 18

Woodland Manor III Associates v. Keeney, 713 A.2d 806 (R.I. 1998) 12, 16, 24

TABLE OF AUTHORITIES – Continued

Page

STATUTES, CONSTITUTIONS & CODES

16 U.S.C. § 470(a) 4

28 U.S.C. § 1257 3

Fifth Amendment, United States Constitution 2, 3, 8, 11, 25, 28

Fourteenth Amendment, United States Constitution 3

Ohio Constitution, Art. I. § 19 3

Ohio Rev. Code § 149.55 4

Ohio Rev. Code § 2731.01 *et seq.* 2, 8

OTHER AUTHORITIES

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Miller & Starr, California Real Estate 2d [2nd ed. 1990, supp. 1999] 10, 15, 17

Nichols on Eminent Domain [rev. 3d ed. 1998] ... 10, 15

Walter, *Appraisal Methods and Regulatory Takings: New Directions For Appraisers, Judges, and Economists,* 63 Appraisal J. 331 (1995) 14, 22

Williams, *American Land Planning Law* (1988 rev. ed., cum. supp. 1998) 13, 15

Zoning and Planning Law Handbook 14,342 (Gordon, Ed., 1988) 15

PETITION FOR WRIT OF CERTIORARI

Petitioner BSW Development Group respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the Supreme Court of the State of Ohio.

OPINIONS BELOW

The Ohio Supreme Court's opinion was filed on October 14, 1998, and is reported as *State ex rel. BSW Development Group v. City of Dayton*, 83 Ohio St. 3d 338, 699 N.E.2d 1271 (Ohio 1998). (App., p. 1.) BSW's timely Motion for Reconsideration was denied in an unreported order filed November 18, 1998. (App., p. 15.) The decision of the Ohio Court of Appeals appears at App., p. 16, and the Report and Recommendation of the Special Master, addressing the Court of Appeals' sole question of whether the City's actions had denied BSW "all use" of its property, appears at App., p. 18. An earlier decision of the Ohio Court of Appeals and the Judgment of the Court of Common Pleas holding illegal the City's denial of a demolition permit for BSW's building appear at App., pp. 54 and 62, respectively.

JURISDICTION

This case involves the Ohio courts' refusal to provide a constitutional remedy for the four-year temporary taking of a 1 acre parcel of land in Dayton. In 1993, the Ohio courts had declared invalid the City's refusal to grant

BSW a demolition permit. Thereafter, BSW filed suit seeking 5th Amendment compensation for the four years that the City's actions had prevented it from making any economically beneficial or productive use of its property. The City removed the case to U.S. District Court because of the substantial federal questions it contained. The federal question was thus raised at the earliest opportunity, and was significant enough to warrant removal to federal court. That court held the 5th Amendment takings claim was not ripe because BSW had not sought a compensatory remedy for that taking under state law.

The District Court's order was the catalyst for this suit. BSW filed suit in the Ohio Court of Appeals, seeking a writ of mandamus that would command the City under the 5th Amendment to condemn the subject property. That is the local Ohio procedure when a property owner claims that local government action has taken private property without compensation. (Ohio Rev. Code § 2731.01 *et seq.;* App., p. 7.) The Court of Appeals referred the matter to a Special Master with directions to address the one question it believed was dispositive of whether a regulatory taking had occurred within the meaning of this Court's 5th Amendment jurisprudence:

> "whether the city's 1989 denial of a demolition permit deprived BSW of ***all use*** of its property." (App., p. 53; emphasis added.)

In a *reductio ad absurdum* ruling, the Special Master found that, because the owners were storing two wrecked cars and a boat in a dilapidated and boarded-up old warehouse, there was no denial of *"all* use." He thus recommended that relief be denied. (App., p. 18.) The Court of Appeals agreed. (App., p. 16.) The Ohio

Supreme Court affirmed (App., p. 1), based on its reading of this Court's 5th Amendment cases, and then denied BSW's timely Motion for Reconsideration (App., p. 15). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

" . . . nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

"Section 1. . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . . "

Ohio Constitution, Art. I, § 19:

" . . . where private property shall be taken for public use, a compensation therefore shall first be made in money, or first secured by a deposit of money. . . . "

Pertinent portions of the applicable local ordinances are at App., p. 69 *et seq.*

STATEMENT OF THE CASE

In 1984, after completing intensive background investigations, BSW Development Group (BSW) (a partnership composed of an accountant, a building contractor, and an

attorney) purchased two adjoining parcels of land in Dayton. The property had old, run-down buildings on it that had suffered from years of intense use and, eventually, neglect. No building was structurally sound; each required repairs costing more than its value in order to make it rentable in the Dayton market.

Accordingly, BSW planned to demolish the old buildings and construct a new complex of two buildings on the property. Those plans were known to, *and approved by,* the City. The property was properly zoned for such use at all times, and was in an "enterprise zone," so designated by the City to encourage private redevelopment of older properties like this to revitalize the area.

In 1988, BSW demolished and replaced the first of the two buildings uneventfully. The City, however, was not satisfied with the amount of parking provided. BSW agreed, and the City understood, that additional parking would be made available as soon as the second building was demolished and replaced. When BSW's project was complete, the new structures would work together and share an appropriate amount of parking space.

While this was going on, the City – without giving BSW notice or opportunity to be heard – had taken steps to try to have the remaining building added to the State's list of historical structures, even though the building had not been included in lists of historic buildings created by the City in 1981 (before BSW bought the property) and 1986 (after BSW's purchase). Moreover, in 1978 and 1985, the State had expressly rejected such listing. Under the City's ordinances, in contrast to both federal and state law (16 U.S.C. § 470[a]; Ohio Rev. Code § 149.55), neither

notice to nor consent by the owner of the property was required.

In 1989, when BSW sought a permit to demolish the second dilapidated building and complete its project, the City suddenly refused. The City's secretive actions in *seeking* (even though not obtaining) historical recognition for the building were now said to have supposedly changed its status. A City ordinance delegated preliminary demolition authority to the City's Landmark Commission for all property either listed on or eligible for listing on the state or federal register of historic structures.[1] BSW thereupon asked the Landmark Commission for a certificate of appropriateness for a demolition permit, since City ordinances permit demolition even of properly designated historic buildings if the cost per square foot to rehabilitate a building will exceed the market value per square foot of similar buildings in the vicinity. Although the evidence showed without contradiction that that was indeed the case with BSW's building, the Landmark Commission denied its demolition request. On administrative appeal, the Board of Zoning Appeals affirmed.

Of course, this building was no "landmark;" it was a dilapidated, dangerous firetrap – literally so, as later

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[1] In fact, the City was playing fast and loose with its own ordinances. As the evidence would later show, the City's request for historical recognition for this building was not filed with the State until several months *after* BSW sought its demolition permit. Thus, BSW's enforced detour through the Landmark Commission was wholly unwarranted legally, as well as factually.

events proved. Nothing about it satisfied any standard of historic interest, and the property had never been included in any list of such buildings. What it was, was a derelict in need of demolition. It was old, its maintenance costs were high, and it was unable to compete economically for tenants with other buildings in Dayton. In fact, throughout the administrative and judicial appeals process, the City repeatedly threatened BSW with criminal prosecution because of the nuisance created by this building that the City simultaneously asserted to be "historical" and in need of preservation. The City considered the building so unsafe that it built a barricade fence around it to prevent entry by the City's homeless. But no effective police protection was provided, and this supposedly "landmark" building became a "hobo jungle," in which the trespassing occupants would periodically set fires for warmth. They eventually set one fire too many and, in November 1998, burned down the building. The City – whose denial of a demolition permit began this whole sorry charade – then ordered BSW to demolish its charred remnants. In January 1999, the building was razed.

Back to 1989. BSW appealed the City's administrative denial of its permit to the Montgomery County Court of Common Pleas. That court reversed the Board of Zoning Appeals' decision, holding that the City had denied BSW due process and equal protection and that the City's ordinances were unconstitutional as applied to BSW's property. (App., p. 62.) The Ohio Court of Appeals affirmed, holding that BSW's evidence was ample to prove that renovating the building would have cost more than the market value of nearby buildings, and that

therefore the City's interference with the owner's plans was unlawful. (App., p. 54.)

By the time the Court of Appeals ended that phase of the litigation, it was 1993. Timing is everything in real estate development, and the market in 1993, was not what is had been in 1989. Costs had escalated and prospective tenants were scarce. The economically sound plans that BSW had drawn in 1989 were no longer appropriate.[2] Thus, when the City requested a reuse plan as a condition to demolition approval in 1993, the request was not a simple one to fulfill.[3] Because of the need to start from scratch with its planning, the radical change in the market, and the losses it had suffered during the four years the City had prevented economically productive use, BSW – no longer able to proceed with its plans – sued to collect compensation for the City's constitutional violations.

Although BSW filed its suit in state court, the City removed it to U.S. District Court because of the presence of substantial federal questions. (*See City of Chicago v.*

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[2] The nationwide recession of the early 1990s hit the real estate development market quite hard. (E.g., Hamilton, "Investor's Corner," Investor's Business Daily, p. A7 (March 3, 1997).

[3] In fact, the City's demand was irrational because the urgent need to demolish a derelict building has nothing whatever to do with what will eventually be built on its site. The notion that landowners must maintain a dangerous firetrap in a declining market until they come up with a plan of redevelopment of the site is simply absurd – it defies, not promotes, the objective of public safety that lies at the core of the police power.

International College of Surgeons, 522 U.S. 156 [1997].) Once there, the City – contradicting its own contention that federal issues needed to be resolved – succeeded in having that court dismiss the 5th Amendment takings claim on the ground of lack of federal jurisdiction for want of ripeness because BSW had failed to adequately take advantage of state court compensation procedures. As a consequence, BSW timely filed this suit in the Ohio Court of appeals under Ohio Rev. Code § 2731.01 *et seq.*, seeking a writ of mandamus to compel the City to condemn its property. The Court of Appeals referred the matter to a Special Master with directions to address the one question it believed was dispositive of whether a regulatory taking had occurred:

> "whether the city's 1989 denial of a demolition permit deprived BSW of ***all use*** of its property." (App., p. 53; emphasis added.)

As noted earlier, the Special Master took that direction literally and, in a *reductio ad absurdum* ruling, decided that "all" use had not been prevented because there were two wrecked cars and a boat stored inside the derelict building, and parts of the surrounding grounds were used for parking.[4] Based on that solitary factual finding – and without consideration of whether those "uses" were economically viable, beneficial, or productive, as required

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[4] Please recall that the City had already told BSW that the parking for its first building was inadequate and space on this adjoining land would have to be found to augment what was already provided. Of course, BSW's plan was to construct a new building where the subject derelict then stood and, in the process, provide ample parking for both buildings.

by this Court's settled holdings (e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-1016 [1992]) – the Court of Appeals denied the writ and the Ohio Supreme Court affirmed.

SUMMARY OF ARGUMENT

Many people believed that, with the decisions this Court issued in 1987,[5] much of the lower court confusion surrounding issues of regulatory taking would be dispelled, because those decisions supplied substantially more doctrinal guidance to lower courts than earlier ones.

It hasn't worked out that way. Confusion still abounds, as both courts and commentators continue to complain. One of the key problems lies in applying this Court's formula that a regulatory taking occurs when government action denies property owners "economically viable" or "economically beneficial or productive" use of their land. (E.g., *Lucas*, 505 U.S. at 1015-1016.) The following comments are representative:

- "The basic rules seems to be that . . . no taking occurs unless the owner is deprived of all economically viable use of the property. The exact point at which economic viability is gone is unclear, though. . . . " (DeLong, Property Matters, p. 289 [1997].)

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[5] Including *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987), and *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987).

- " . . . there is no established judicial standard to test when an owner has lost the 'economically viable use' of the property. . . . " (7 Miller & Starr, California Real Estate 2d, § 23.19 at 665 [1990, supp. 1999].)

- "The only thing that is certain is that various courts – including the United States Supreme Court – will be required to visit these issues again." (2A Nichols on Eminent Domain, § 6.04 at 6-51 [rev. 3d ed. 1998].)

In the case at bench, the Ohio courts exacerbated that confusion. They injected a wild card into legal analysis when they reasoned that a different standard applied to temporary takings than to permanent takings. In their view, a permanent taking would arise when *all economically viable use* was denied the property owner, but a temporary taking could not occur unless the government regulation denied the owner *all use* of the property. The reasons for this distinction are obscure. Such a holding is not only contrary to this court's takings jurisprudence that measures permanent and temporary takings by the same substantive standard (e.g., *First English*, 482 U.S. at 318), it is virtually – if not always – impossible for property owners to meet. This case is a paradigm. The Special Master found that "all use" had not been denied because the owners stored two wrecked cars and a boat inside a boarded-up old warehouse and used some of the peripheral land for parking to serve another building. None of that interim use made economic sense. None of it would have warranted purchasing or carrying the property. None of it was economically viable or productive or

beneficial. Yet such minimal uses can be said to be "available" in a wide variety of situations. If temporarily storing two disabled cars and a boat on a valuable downtown parcel of property is all that is necessary to destroy the 5th Amendment's protective shield, then its constitutional protection will be rendered illusory.

Guidance from this Court is made all the more necessary because the core issue in these cases is the meaning of the 5th Amendment. The interpretation and application of that Amendment's protection should not change depending on the state in which a citizen owns land. However, because this Court has held that takings litigation must first be considered by the various state judiciaries before the federal courts can even consider whether the 5th Amendment has been violated (*Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172, 195 [1985]), state courts will continue to be the primary locus of decision-making in these cases. It is thus imperative that those 50 local jurisdictions have clear constitutional guidelines to follow in applying protection of the U.S. Constitution that will ultimately be measured by adherence to that organic charter.[6] As shown hereafter, the decision below conflicts in several important ways with decisions of other state courts on the same issues. As

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[6] Although sometimes applying their own constitutions in addition to the 5th Amendment, it is clear that state courts have followed this Court's lead in takings law. See, e.g., *Golf Club of Plantation, Inc. v. City of Plantation*, 717 So. 2d 166 (Fla. App. 1998); *Kempf v. City of Iowa City*, 402 N.W.2d 393 (Iowa 1987); *614 Company v. Minneapolis Community Dev. Agency*, 547 N.W.2d 400 (Minn. App. 1996).

things stand now, there is no uniform federal constitutional law. Instead, geography is destiny.

For example, Louisiana and Delaware agree with the Ohio courts' view that a temporary taking does not occur unless "all use" has been prevented.[7] But other states disagree.[8]

The Ohio Supreme Court's determination that "the right to demolish a building and construct a new building" is not one of the "essential sticks in the bundle" of property rights (App., p. 9) is directly contrary to the New York Court of Appeals' decision in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989). In the New York case, a city ordinance prevented the owners of rundown, "single room occupancy" hotels from demolishing them in order to build new structures. The Court held the ordinance was invalid as a taking of property without compensation, concluding that "the development rights which have been totally abrogated by the local law are, standing alone, valuable components of the 'bundle of

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[7] *Standard Materials, Inc. v. City of Slidell*, 700 So.2d 975, 984, fn. 13 (La. App. 1997); *Steen v. County Council*, 576 A.2d 642, 649 (Del. Ch. 1989). Connecticut briefly flirted with this standard (see *Port Clinton Associates v. Board of Selectmen*, 587 A.2d 126, 133, fn. 15 [Conn. 1991]), but has since abandoned it (*Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196, 214, fn. 15 [Conn. 1998]).

[8] E.g., *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992); *Sintra, Inc. v. City of Seattle*, 829 P.2d 765, 774 (Wash. 1992); *614 Company v. Minneapolis Community Dev. Agency*, 547 N.W.2d 400, 406-407 (Minn. App. 1996); *Woodland Manor III Associates v. Keeney*, 713 A.2d 806, 813 (R.I. 1998); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401, 407 (Neb. 1994).

rights' making up their fee interests." (*Seawall*, 542 N.E.2d at 1067.)

It is hardly surprising that such conflict and confusion would appear in lower court opinions. As this court itself conceded:

> "Regrettably, the rehetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision. . . . " (*Lucas*, 505 U.S. at 1016, fn. 7.)

The lack of coherence in the law leads only to confusion and injustice in the lower courts, as each wanders its own way to apply standards that lack clear guideposts. The late Professor Norman Williams put it accurately, if somewhat pungently, in his nationally recognized text:

> "If there are no rules specific enough to control future decisions, then every case is decided according to the *gastronomic school of jurisprudence;* that is, this is an area where government acts according to *gut feeling* in the individual case, instead of by rule of law." (1 Williams, American Land Planning Law 136 [1988, supp. 1998].)

Bluntly, it is simply intolerable for an important component of the Bill of Rights to be applied according to "gut feeling in the individual case, instead of by rule of law." Such chaos would not be tolerated in any other area of constitutional law – neither should it be permitted here. (*See Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].)

This case presents the Court with the opportunity to provide clarity to its "economically viable" or "beneficial" or "productive" use test, a formulation that, absent *some* elucidation by this Court, remains confusing to the

lower courts and, perhaps more importantly, to appraisers and land economists who are called upon to provide testimonial substance to this judicial expression of principle. As one valuation commentator aptly put it, this is "one of the most important *and perplexing* areas of appraisal theory and practice. . . . " (Walter, *Appraisal Methods and Regulatory Takings: New Directions For Appraisers, Judges, and Economists,* 63 Appraisal J. 331 [1995]; emphasis added.) While it is lawyers and judges who have been wrestling with definitional terms, it is appraisers and economists who must ultimately apply them and try to make sense of them in concrete applications. At the moment, they have precious little to work with; confusion – not clarity – appears to reign.

REASONS FOR GRANTING THE WRIT

I

THERE IS CONFUSION IN THE LOWER COURTS ABOUT THE MEANING OF "ECONOMICALLY VIABLE USE" OF PROPERTY

Thirteen times in the last two decades, this court has repeated that, if a regulation deprives a property owner of the "economically viable use" of his property, a taking has occurred.[9]

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[9] *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978); *Kaiser Aetna v. United States,* 444 U.S. 164, 174 n. 8 (1979); *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980); *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 653 (1981) (dissenting opinion expressing the substantive views of five Justices); *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 68

However, in *none* of those cases did the Court explain the criteria of economic viability. The phrase was simply stated and lower courts were left to shift for themselves. Not surprisingly, those courts have developed no consistent, or even predictable, definition, leaving litigants (as well as those who would prefer to order their lives by clear rules and avoid litigation) adrift.

Commentators are in accord that chaos prevails. The following is typical:

> "This virtually *standardless* inquiry has provided *little predictability*" for property owners, nor has it served as a reliable guide for government action." (Lawrence, *Regulatory Takings: Beyond the Balancing Test* [1988] 20 The Urban Lawyer 389, 400; emphasis added.)[10]

As the 9th Circuit put it, " . . . the precise meaning of 'economically viable use' of land is elusive and has not been clarified by the Supreme Court." (*Lake Nacimiento*

(1981); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 296 (1981); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, ___, 137 L.Ed.2d 980, 991, fn. 10 (1997).

[10] For similar assessments, see, e.g., 1988 Zoning and Planning Law Handbook 14,342 (Gordon, Ed., 1988); 2A Nichols on Eminent Domain, § 6.03[5] at 6-50 [rev. 3d ed. 1998]; 7 Miller & Starr, California Real Estate 2d, § 23:19 at 666-667 [2nd ed. 1990, supp. 1999]; 1 Williams, *American Land Planning Law*, § 4.03 at 93 (1988 rev. ed., cum. supp. 1998).

Ranch Co. v. San Luis Obispo County [9th Cir. 1987] 841 F.2d 872, 877.)[11] In that case, the absence of standards permitted the court to ignore testimony that each of the supposedly permitted uses of land had no economic value to private property owners. The same thing seems to have happened below. Here, the Ohio Supreme Court concluded that there was no deprivation of economically viable use because of BSW's two wrecked cars and boat, and because some space outside could also be used for parking required for its other building. **But none of that was economically viable use.** Those uses were trivial; they were merely attempts to mitigate the financial sink-hole that the property became after the City refused to permit its demolition at the time when redevelopment of the site would have been productive and feasible.

In sharp contrast with the decisions of the 9th Circuit and the Ohio Supreme Court, other courts hold that when this Court insisted that a takings inquiry must examine all ***economically viable*** use of the subject property, the Court must have intended something beyond *any* use at all. Surely, the concept must mean more than some trivial or theoretical use that consumes more than any property owner could recoup – or more than some interim storage of junk, as happened below. It should not even take

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[11] To this day, courts continue to echo this sentiment. See, e.g., *McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643, 650 (S.C. App. 1998) ("the 'deprivation of all economically beneficial use' rule is not imbued with precision"); *Woodland Manor*, 713 A.2d at 810 (takings law "hardly a model of clarity"); *614 Company v. Minnesota Community Dev. Agency*, 547 N.W.2d 400, 405 (Minn. 1996) (takings law "in a state that remains unclear").

reference to a dictionary to conclude that "economically viable" means a use that is capable of producing a present (or at least foreseeable or potential) income.[12] A "use" that engenders a loss (or that lacks even the possibility of producing a gain) cannot be considered to be "economically viable."[13] If anything, such a "use" is economically moribund. As one commentator put it:

> "Presumably, these concepts require at least that a property owner be allowed a fair and reasonable return or profit from his property." (7 Miller & Starr, California Real Estate 2d, § 23:19 at 667 [2d ed. 1990, supp. 1999].)

It has been the law at least since *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928), that a municipal insistence on uses that fail to provide the landowner with the opportunity for a reasonable return is unconstitutional.

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[12] See *Orion Corp. v. State*, 747 P.2d 1062, 1073 (Wash. 1987) ("some present, possible, and reasonably profitable use"); *Ranch 57 v. City of Yuma*, 731 P.2d 113, 122 (Ariz. 1986) ("a use is not reasonable unless the landowner can make it economically productive"); *Steel v. Cape Corp.*, 677 A.2d 634, 648-649 (Md.App. 1996) ("economically viable" means "reasonable"; not reasonable to expect owner to build pie shaped house); *Corrigan v. City of Scottsdale*, 720 P.2d 528, 538 (Ariz. App. 1985) ("reasonable economic return on his investment"); *Hornstein v. Barry*, 530 A.2d 1177, 1185 (D.C.App. 1987) ("reasonable financial return").

[13] *Kempf v. City of Iowa City*, 402 N.W.2d 393, 398 (Iowa 1987) ("the cash flow income would not retire the debt"); *Wheeler v. City of Pleasant Grove*, 833 F.2d 167, 271 (11th Cir. 1987) ("an injury to the property's potential for producing income or an expected profit").

This Court's decisions provide an additional guidepost that *any* use is not the equivalent of *economically viable or beneficial or productive* use, by repeatedly referring to a property owner's ability to generate a *profit* from the property. In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), this Court emphasized that the regulations permitted Penn Central "not only to profit from the Terminal, but also to obtain a 'reasonable return' on its investment" (438 U.S. at 136), which is what saved the regulation from being a taking of Penn Central's property. A few years later, in *Williamson County*, 473 U.S. at 200, this Court said that one indicator that a taking had occurred was if the regulation interfered with the owner's "investment-backed profit expectations." In *Keystone*, the Court upheld Pennsylvania's coal mining restrictions because there was no indication that they inhibited the mine operators' ability to "profit" from their properties. (480 U.S. at 485, 496.) And, in *Lucas*, 505 U.S. at 1017, this Court quoted Lord Coke's famous observation, "for what is the land but the profits thereof[?]"

The Minnesota Court of Appeals recently concluded that *Lucas* elevated the concept of profitable use as a consideration in the takings analysis and also required examination of each permitted "use" to determine its economic viability:

> "Lucas calls for compensation based on loss of economic value. It views property in terms of uses or options for use and requires that the uses, seemingly each of them if more than one, be examined for lack of economic benefit. Although not including 'unprofitable' in its litany of words tied to the concept of economic use of property, the court (a) uses the synonym

> 'beneficial,' (b) speaks of developmental and productive uses, and (c) deals with a trial court finding that evidently equated 'valueless' with the loss of the most profitable use." (*614 Company v. Minneapolis Community Dev. Agency*, 547 N.W.2d 400, 405 [Minn. App. 1996].)

If the ability (or at least the opportunity) to profit from one's land is an important part of the takings equation, then surely this Court's standard cannot be satisfied, as the courts below seem to believe, by the storage of a couple of junk cars and an old boat on a valuable downtown building site.

Over the years, this Court has steadily increased the protection it said that property owners are entitled to. In *Nollan*, the Court offered protection against the " . . . cleverness and imagination . . . " of governmental word games. (483 U.S. at 841.) In *First English*, the Court said that such protection was constitutionally mandated even if it " . . . lessen[s] to some extent the freedom and flexibility of land use planners and governing bodies of municipal corporations. . . . " (482 U.S. at 321.) And, in *Dolan*, the Court emphasized that the protection of property owners under the 5th Amendment was on the same plane with the protection of other Bill of Rights Guarantees. (512 U.S. at 392.) If those words are to have meaning, then the criteria to be used by the lower courts must be clear enough that they can be predictably applied. As of now, they are not.

II

LOGICALLY, THERE CAN BE ONLY ONE SUBSTANTIVE STANDARD FOR A TAKING, WHETHER IT IS PERMANENT OR TEMPORARY, BUT THERE IS CONFLICT IN THE LOWER COURTS

Although serious problems remain in applying this Court's "economically viable use" standard for regulatory takings, the decision below intensifies the problems by adding another layer of confusion – concluding, for obscure reasons, that the substantive standards for permanent and temporary regulatory takings are different.

The use of such different standards becomes clear in the opinions of the Court of Appeals (App., p. 44) and the Recommendation of the Special Master (App., p. 19). The Court of Appeals evidently believed that, in order for a property owner to recover for a **temporary** taking, the regulatory action must have caused a loss of ***all use*** of the property. (App., p. 44.) Thus, when the Court of Appeals referred the matter to a Special Master for trial, it set forth only this single issue:

> "whether the city's 1989 denial of a demolition permit deprived BSW of ***all use*** of its property." (App., p. 53; emphasis added.)

The Special Master plainly felt bound by that statement of the issue and therefore reported that, because there were things stored inside the boarded-up warehouse, and some parking for another building available on the building's periphery, the City's action had not deprived BSW of ***all use*** of the property. (App., pp. 26-27.) Based on that finding, the Court of Appeals held

there was no temporary taking. (App., p. 16.)[14] Please note that this conclusion was consciously divorced from any concept of economic viability of the remaining "uses." All the Special Master and the Court of Appeals were interested in was whether there was *any* use remaining, irrespective of its economic rationality.

With respect, that standard makes no sense either legally or economically, and it creates conflict with the decisions of other state courts on the same issue.

First, if nothing else, regulatory takings law is complex and confusing enough as it is. There is no reason to make it worse. Moreover, in *First English*, this Court's seminal temporary takings decision, the Court quite evidently was trying to align the law of eminent domain – in all its facets, whether direct condemnation or physical or regulatory inverse condemnation, whether permanent or temporary – so that elemental doctrinal features would apply across the board. Thus, in its analysis of a temporary regulatory taking, this Court relied on permanent physical inverse condemnation cases (482 U.S. at 316-317), temporary direct condemnation cases (482 U.S.

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[14] The record below is somewhat blurred because the Ohio Supreme Court's opinion abruptly abandons the "all use" language and *says* it is applying the standard deprivation of "all economically viable use" discussed earlier. (App., pp. 6, 7, 8, 11.) But that is not what the Special Master or the Court of Appeals decided, as the record plainly shows. The decisions the Ohio Supreme Court reviewed plainly sought only to learn whether there was a deprivation of ***all use***. Note also, as shown in the preceding section, that, if the Ohio Supreme Court thought it was applying the "economically viable use" standard, the facts simply cannot support it.

at 318), and cases dealing with the fundamental powers of different branches of government to control the duties entrusted to them by the Constitution (482 U.S. at 319-321).

Second, as a matter of practical reality, appraisers and economists are having enough difficulty working with the standards this Court has already announced. As a recent appraisal commentary summed it up, "there is almost universal consensus in the prodigious takings literature that takings theory is a 'muddle,' 'chaotic,' 'unsatisfactory,' 'unpredictable,' lacking in 'doctrine,' and a 'mess.' " (Walter, *Appraisal Methods and Regulatory Takings: New Directions For Appraisers, Judges, and Economists*, 63 Appraisal J. 331 [1995].) There is no reason to add to that litany, and every reason to simplify it.

Third, there is already conflict in the lower courts on this issue. The courts below, along with those in Louisiana and Delaware have concluded that *First English* requires compensation for a temporary taking only when "all use" has been precluded. (*Standard Materials, Inc. v. City of Slidell*, 700 So.2d 975, 984, fn. 13 [La. App. 1997]; *Steen v. County Council*, 576 A.2d 642, 649 [Del.Ch. 1989].)[15] And California simply refuses to consider time

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[15] It is possible that these courts were confused by the procedural posture of *First English*. The case had been dismissed on the pleadings without trial. Thus, what this court had before it was only the complaint that alleged a deprivation of "all use." (*First English*, 482 U.S. at 308.) Thus, when this Court discussed the case before it, it did so in the context of the case that had been pled, i.e., one in which "all use" had been precluded. It was error for the Ohio courts to translate that contextual discussion into a categorical legal restriction.

spent in litigation (after a final denial of use) to prove that the regulation was invalid (or invalidly applied) as a temporary taking. (*Landgate, Inc. v. California Coastal Commn.*, 953 P.2d 1188 [1998].)

Other courts have reached a contrary conclusion. For example, in *Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196 (Conn. 1998), the town denied a variance. Notwithstanding that the property owners retained some use of the service station on their property, the Connecticut Supreme Court held that they could pursue compensation for a temporary taking of their property during the time that it took to litigate the invalidity of the town's denial. The court expressly noted that the town's argument was "contrary to the holding of *First English*. . . ." (247 Conn. at 196.) Likewise, in *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994), the Nebraska Supreme Court rejected the city's argument that it should not be liable for a temporary taking because all use of the property had not been taken, by referring to "the line of cases which recognizes relief is possible from regulatory takings which do not deprive the owner of all economic use of the property." (515 N.W.2d at 407.) On remand from this Court's decision in *Lucas*, the South Carolina Supreme Court held that a temporary taking had occurred as a matter of law. (*Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 [S.C. 1992].) This, in spite of the fact that Mr. Lucas could still "picnic, swim, camp in a tent, or live on the property in a movable trailer." (*Lucas*, 505 U.S. at 1044 [Blackmun, J., dissenting].)

The facts in *Sintra, Inc. v. City of Seattle*, 829 P.2d 765 (Wash. 1992) resemble those at bench. The plaintiff owned a building the court characterized as being in "an

advanced state of disrepair" (829 P.2d at 768), and its new owner wanted to improve it. At that time, the city had an ordinance requiring all those who wanted to remove low income housing units from the market to contribute to a housing fund. That ordinance was eventually struck down, but not before it caused the owner of this building to lose years' worth of use. The Washington Supreme Court held that an action for compensation for a temporary taking was appropriate even though *all* use had not been denied. In the court's words, "a temporary taking is compensable under the Fifth Amendment, and Sintra need not prove that the property remained unusable after the [regulation] was invalidated. [Citing *First English.*]" (829 P.2d at 774.) Please note that the same kind of interim "uses" found available to BSW were available to Sintra. Nonetheless, Sintra's action was allowed to proceed.[16]

Moreover, in denying compensation for the years of non-use caused by the litigation to invalidate illegal regulatory action, courts like Ohio and California are in conflict with others, including Connecticut, Rhode Island, Nebraska, and Florida.[17] These courts have held that a

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[16] See also *614 Company v. Minneapolis Community Dev. Agency*, 547 N.W.2d 400, 406-407 (Minn. App. 1996) (reduced occupancy of building sufficient to state claim for temporary taking where complaint alleged that remaining uses were not economically viable).

[17] *Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196 (Conn. 1998); *Woodland Manor III Associates v. Keeney*, 713 A.2d 806 (R.I. 1998); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994); *Alexander v. Town of Jupiter*, 640 So.2d 79 (Fla. App. 1994).

claim for a temporary taking is proper when the administrative proceedings have concluded and a final administrative decision has been made. As the Connecticut Supreme Court put it, "It is unnecessary for the plaintiff to await *judicial review* of the administrative action" because, as this Court held in *First English*, invalidation of the regulatory action would not suffice to provide the constitutionally-mandated compensation. (*Cumberland Farms*, 247 Conn. at 213; emphasis, the Court's.) The Ohio/California approach, in failing to compensate for the loss of economically viable use during the litigation period, conflicts with these state court decisions as well as *First English*.

Thus, this Court is now faced with a clutch of utterly incompatible doctrinal approaches leading to diverse results in the lower courts. Yet all those courts claim to apply the same constitutional provision to similar facts. With all due respect, this isn't constitutional law – it's a Tower of Babel.

State courts, individuals, and government agencies are in need of a workable rule. There has been enough litigation in enough courts to demonstrate to this Court that the application of its doctrine is in disarray. Without some authoritative indication of the parameters of economic viability required to avoid a regulatory taking claim, lower courts are certain to go on needlessly expending their own and the litigants' time and resources in pursuit of some sort of elusive legal Holy Grail. Without intervention and instruction by this Court, the disarray in the lower courts will endure, making the 5th Amendment rights of individuals (not to mention the working rules of regulatory agencies) vary depending on

their geographic location. That defies the basic concept of supremacy of coherent federal constitutional law. It should not be permitted to continue.

III

THERE IS CONFLICT BETWEEN OHIO AND NEW YORK ON WHETHER THE RIGHT OF A BUILDING OWNER TO DEMOLISH A DERELICT BUILDING AND REBUILD ON THE SITE IS A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT

When the Ohio Supreme Court reviewed the facts below, it concluded that preventing BSW from demolishing its decrepit building and replacing it with a modern one did not destroy "a fundamental attribute of BSW's ownership" (App., p. 9) because "the right to demolish a building and construct a new building" is not one of the "essential sticks in the bundle of rights that are commonly characterized as property" (App., p. 9). Even while conceding that the owners' rights to access and to exclude others rose to that protected level, the court refused to accord similar protection to the owners' right to rid themselves of a useless, derelict building (App., p. 9), and build on their land subject only to reasonable regulations. (Compare *Nollan v. California Coastal Commn.*, 483 U.S. 825, 834, fn.2 [1987].)

New York's highest court disagrees. Flatly. On indistinguishable facts. In the mid-1980s, at about the same time that BSW began its trek through Dayton's bureaucratic labyrinth, New York City enacted a law that directly affected the rights of investors who bought rundown residential buildings (called single room occupancy

hotels, or SROs) in order to improve them. To protect the city's stock of low income housing, the new law forbade the demolition of SROs.

When challenged, the law was struck down by the New York courts. (*Seawall Associates v. City of New York*, 542 N.E.2d 1059 [N.Y. 1989].) The reasons for that result, and the judicial reasoning, are directly in conflict with the result reached below by the Ohio courts. The New York Court of Appeals recognized the reality that people who buy dilapidated buildings generally do so with the intent to demolish them and replace them with something of greater utility and value, which is a positive thing. Just like BSW intended here. As the New York court put it:

> "Unquestionably, the effect of the law is to strip owners of SRO buildings – who may have purchased their properties solely to turn them into profitable investments by tearing down and replacing the existing structures with new ones (as plaintiffs claim they have) – of the very right to use their properties for any such purpose." (542 N.E.2d at 1066.) "Local Law No. 9 totally prohibits the sole use – entirely permissible before the enactment of the law – for which investment properties are purchased: commercial development." (542 N.E.2d at 1067.)

Acknowledging that reality, the New York Court of Appeals next examined whether the right of investors to purchase old buildings in order to raze and replace them rose to the level of a constitutionally protected right

within the "bundle of sticks" that we generally view as property.[18] Plainly, it did:

> "There can be no question that the development rights which have been totally abrogated by the local law are, standing alone, valuable components of the 'bundle of rights' making up their fee interests. . . . [D]evelopment rights 'are an essential component of the value of the underlying property'. . . . " (542 N.E.2d at 1067.)

The decisions of Ohio and New York are thus in a head-on conflict on the question of whether the 5th Amendment protects the right to demolish and replace a derelict building. Each opinion professes to be enforcing the same constitutional provision and purports to be applying the same precepts from this Court's jurisprudence. Each leads to an opposite result. Both cannot be right. BSW believes that the New York approach is the proper one, and the considered reasoning of *Seawall Associates* is preferable to the curt *ipse dixit* of the Ohio Supreme Court.[19] Whatever the merits of this judicial

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[18] This Court has frequently used the "bundle of sticks" analogy when examining property rights. E.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 174 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

[19] Whatever can be said in support of laws that require owners of truly historical structures to preserve them necessarily falters when the municipal usage to conserve applies to a decrepit derelict of a building with no pretense of historical or architectural significance. The police power does not stretch far enough to justify the conscription of American citizens as involuntary keepers of useless and economically irreparable structures. It is one thing to say of a building,

dispute, however, the one clear thing that emerges is that the country will be better off if this Court provides some guidance now, before the confusion spreads further, needlessly consuming the time, efforts, and resources of litigants and courts alike.

CONCLUSION

For years, this Court has emphasized the "ad hoc" nature of regulatory takings law. (E.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 [1984]; *Kaiser Aetna v. U.S.*, 444 U.S. 164, 175 [1979]; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978].) Acknowledging the merit in the Court's reluctance to declare "one size fits all" rules, there comes a point beyond which the need for some more rigorous doctrine asserts itself. Courts and commentators from around the country and from all points of the regulatory/political spectrum decry the absence of useful criteria for determining when governmental action crosses the line and violates the constitution. A situation in which neither the regulators nor the regulated can tell what action is constitutional until the last appeal to the last available court is exhausted serves neither the regulators nor the regulated – nor the courts. But that is essentially where this branch of jurisprudence finds itself today.

"George Washington slept here;" it is quite another to force a landowner to provide sleeping quarters to transients and vandals. That is simply unreasonable, and unconstitutional.

This case presents the Court with the opportunity to take the first badly needed step to clarify the law defining "economically viable use," as well as the substantive requirements for temporary takings. BSW prays that the Court take that opportunity and grant certiorari to review the manifest injustice wrought below.

Respectfully submitted,

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APPENDIX CONTENTS

Appendix
Page No.

A. OPINION FROM THE OHIO SUPREME COURT ENTERED 10/14/98 1

B. RECONSIDERATION ENTRY OHIO SUPREME COURT ENTERED 11/18/98 15

C. ENTRY OVERRULING REALATOR'S OBJECTIONS AND DENIAL OF WRIT OF MANDAMUS* ENTERED 01/23/1998 16

D. REPORT AND RECOMMENDATION OF SPECIAL MASTER* ENTERED 10/15/1997 18

E. JOURNAL ENTRY* ENTERED 10/15/97 29

F. DECISION AND ORDER* ENTERED 03/27/96 31

* COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO, SECOND APPELLATE DIVISION

G. OPINION
COURT OF APPEALS FOR
MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT
ENTERED 05/07/93 54

H. JUDGMENT ENTRY
COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
CIVIL DIVISION
ENTERED (12/04/91) 62

I. DAYTON ZONING CODE
HISTORICAL DISTRICT
R.C.G.O. § 150.230-150.261 69

J. REVISED HISTORIC DISTRICT
ORDINANCE
R.C.G.O. §§44.50-44.52, 44.55, 44.57,
150.45, 150.230-150.2599 108

Statement of the Case

[THE STATE EX REL.] BSW DEVELOPMENT GROUP, APPELLANT,
v. CITY OF DAYTON ET AL. APPELLEES.

[Cite as *Sate ex rel. BSW Dev. Group v. Dayton* (1998), 83 Ohio St. 3d 338.]

Mandamus to compel respondents to commence appropriation proceedings on relator's building after respondents denied a demolition permit for a building listed on theNational Register of Historic Places – Writ denied, when.

(No. 98-473-submitted August 19, 1998-Decided October 14, 1998.)

APPEAL from the Court of Appeals for Montgomery County, No. 15186.

In the late-nineteenth century, a building now known as the Wilcon Building was constructed along the Miami-Erie Canal in Dayton. The building was originally used for various enterprises, including linseed oil manufacturing, flour milling, and wheat and tobacco storage. By the 1980's, Wilcon Corporation ("Wilcon"), Dayton Tire Sales, and Wat-kem Mechanical, Inc. ("Wat-kem") each occupied one-third of the building. Wilcon Corporation, a construction company owned and operated by Dennis Williams, had its office as well as a millwork shop and storage area in the building. Dayton Tire used its portion of the building for tire sales and installation in

addition to other automotive services. Wat-kem, a mechanical contracting company, had an office and storage space in the building.

In 1984, BSW Development Group ("BSW"), a partnership composed of attorney Dwight D. Brannon, accountant William I. Schoenfeld, and Williams, purchased the Wilcon Building and adjoining property for $315,000. BSW subsequently sold a portion of the property that did not include the Wilcon Building for $250,000. BSW decided to develop an office park consisting of two new buildings on the remaining land. Pursuant to its development plan, BSW demolished the existing building on the property adjacent to the Wilcon Building and constructed a new building called Canal North, which BSW made available for lease. BSW planned then to tear down the Wilcon Building and construct a new building to be known as Canal South on the property.

In anticipation of the demolition of the Wilcon Building, Wilcon moved to the Canal North building in January 1989, and Dayton Tire vacated the Wilcon Building after BSW brought an eviction action. Wat-kem had previously vacated the Wilcon Building. At the time that Wilcon and Dayton Tire vacated the Wilcon Building, Wilcon and Dayton Tire were paying approximately $18,000 and $23,000 in annual rent, respectively. Before moving out of the building, Wilcon renovated its space by constructing new offices, including a computer room and a kitchenette, leveling and carpeting the floors, and reworking the electrical and sanitary systems to bring that portion of the building into compliance with the Dayton Building Code.

In March 1989, BSW applied to appellee city of Dayton for a permit to demolish the Wilcon Building.

Dayton refused BSW's application because BSW had not complied with Section 150.45 of the Dayton Revised Code of General Ordinances, which provides that "[w]henever an application is made for a demolition permit for any structure or site listed on or eligible for the National Register of Historic Places, no demolition permit shall be issued until the applicant has complied with the provisions of Section 150.246 of the R.C.G.O. irrespective of any other provisions of this subchapter." BSW then applied under Section 150.246 of the city code for a certificate of appropriateness from appellee Dayton Landmark Commission. In July 1989, the commission denied BSW's application because BSW failed to introduce clear evidence that the square foot cost of meeting the minimum building code would exceed the square foot market value of similarly used and improved structures in the planning district.[1] In October 1989, appellee Dayton Board of Zoning appeals affirmed the decision of the Landmark Commission. The "as is" value of the Wilcon Building and property at that time was $220,000.00.

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[1] Section 150.246 of the Revised Code of General Ordinances of Dayton provides:

" A demolition permit shall not be issued unless accompanied by an approved Certificate of Appropriateness. The Landmark Commission may only approve a Certificate of Appropriateness if:

"(A) The applicant has given clear evidence that one of the following conditions exist(s):

"* * *

"(4) The square foot cost of meeting the minimum building code would exceed the square foot market value of similarly used and improved structures in the planning district."

BSW appealed the board's decision to the Montgomery County Court of Common Pleas. In 1991, the common pleas court reversed the board's decision. The common pleas court concluded that the Landmark Commission and the board of zoning appeals had denied BSW due process and equal protection and that Dayton's historic preservation ordinances were unconstitutional as applied to BSW's property. Upon further appeal by the board in May 1993, the Court of Appeals for Montgomery County affirmed the common pleas court's decision. In so holding, however, the court of appeals determined that it was unnecessary to pass upon the constitutionality of the ordinances because "BSW fulfilled the stringent requirements of R.C.G.O. 150.246(A)(4) for obtaining the certificate of appropriateness and therefore should have been granted the demolition permit."

Following the court of appeals' May 1993 judgment, the Dayton Historic Preservation Officer notified BSW that the Landmark Commission would issue a certificate of appropriateness for the requested demolition permit when BSW complied with the remaining requirements of Section 150.246 by submitting a reuse plan and requesting a waiver of the fee and bond requirements. The reuse plan requirement is not burdensome, and Dayton was willing to waive the fee and bond requirements.

Instead of submitting a reuse plan and requesting a waiver of the fee and bond requirements, BSW filed an action in the common pleas court alleging, among other things, that appellees, Dayton, the Landmark Commission, and the board of zoning appeals, had taken BSW's Wilcon Building property, thereby entitling BSW to compensation for the taking. In 1995, following removal of the action to a federal district court, the district court granted summary judgment against BSW on its Fifth Amendment takings claim because BSW had not exhausted its state remedies by

seeking a writ of mandamus to compel Dayton to commence appropriation proceedings.

BSW then filed a complaint in the Court of Appeals for Montgomery County for a writ of mandamus to compel appellees to commence appropriation proceedings on the Wilcon Building property. BSW claimed that it was entitled to be compensated for the city's unconstitutional taking of its property, which resulted from appellees' denial of BSW's demolition permit. BSW did not assert any claim that it was entitled to extraordinary relief because the Dayton ordinances relied upon by the Landmark commission and the board of zoning appeals were unconstitutional or that the city officials fraudulently and intentionally misrepresented the landmark status of the Wilcon Building.

The parties submitted evidence and BSW filed a motion for summary judgment. In its summary judgment motion, BSW raised the claim that the Dayton historic preservation ordinances were unconstitutional. The evidence established that after the city's 1989 denial of the demolition permit, BSW abandoned the Wilcon building property, resulting in hazards to the public, including to homeless persons trespassing on the property. BSW had the heat and electricity to the building disconnected. Despite several requests by city officials for BSW to secure the property for the safety of the public, BSW failed to act. Dayton then secured the entrance to the Wilcon building to prevent the general public from accessing the property in order to keep the premises safe. BSW, however, was provided keys to all of the padlocks and was never prevented from accessing the property after the demolition permit was denied. Following the court of appeals' 1993 judgment, Dayton did not restrict BSW's right and ability to use the property or to demolish the Wilcon Building.

In March 1996, the court of appeals issued a decision denying BSW's motion for summary judgment because BSW had not established a permanent, temporary, or physical taking of its property. The court of appeals declined to address BSW's contention that the Dayton historical preservation ordinances were unconstitutional. The court of appeals referred the case to a special master in order to determine the sole issue of whether the city's 1989 denial of the demolition permit deprived BSW of all economically viable use of its Wilcon Building property.

The special master then conducted hearings on the foregoing issue. At the hearings, the evidence established that following the 1989 denial of the demolition permit, BSW used the property surrounding the Wilcon Building for parking, including spaces for one of its Canal North tenants and monthly rental spaces for the general public. BSW also stored a boat and two wrecked cars in the building.

In addition, Michael Cromartie, the city's chief building official, testified that the building was structurally sound and that the city did not require a prospective building tenant to obtain a new certificate of occupancy before leasing the property even if code violations existed in other parts of the building, as long as the use of that portion of the building remained the same as it had been for the previous tenant. Cromartie admitted, however, that BSW had to remedy a few serious hazards, i.e., lack of fire-wall enclosures for the elevator and parts of stairways, and repair of the building's electrical system, before any tenant could move back into the building. These hazards existed at the time that appellees denied BSW's demolition permit.

In 1997, the special master issued a report recommending that the court of appeals deny the writ of mandamus because appellees' denial of a demolition permit did not deprive BSW of all economically viable use of its property. In 1998, the court of appeals overruled BSW's objections to the special master's report, adopted the special master's findings of fact and conclusions of law, and denied the writ.

This case is now before the court upon a appeal as of right.

Dwight D. Brannon & Associates, Dwight D. Brannon and *Walter J. Krygowski,* for appellant.

Freund, Freeze & Arnold, Neil F. Freund and *Shawn M. Blatt*, for appellees.

Per Curiam. BSW asserts that the court of appeals erred by denying a writ of mandamus to compel appellees to commence appropriation proceedings. Mandamus is the appropriate vehicle for compelling appropriation proceedings by public authorities where an involuntary taking of private property is alleged. *State ex rel. Levin v. Sheffield Lake* (1994), 70 Ohio St. 3d 104, 637 N.E. 2d 319, 323, citing *State ex rel. McKay v. Kauer* (1951), 156 Ohio St. 347, 46 O.O. 204, 102 N.E. 2d 703, paragraph three of the syllabus. In these actions, the court, as the trier of fact and law, must determine whether the private property had been taken by the public authority. *Levin*, 70 Ohio St. 3d at 108, 637 N.E. 2d at 323. The United States and Ohio Constitutions guarantee that private property shall

not be taken for public use without just compensation. Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution; see, also, R.C. Chapter 163.

In its various propositions of law, BSW contends that the court of appeals erred by (1) limiting the special master's evidentiary hearings to a single issue, (2) placing the burden of proof on BSW, (3) concluding that the evidence did not establish a compensable taking, (4) refusing to grant BSW's request for a declaratory judgment on the constitutionality of Dayton's historic preservation ordinances, and (5) declining to grant the writ based on Dayton officials' fraudulent and intentional misrepresentation regarding eligibility of the Wilcon building for landmark status.

For the following reasons, however, BSW's contentions are meritless, and we affirm the judgment of the court of appeals.

First, the court of appeals properly limited its special master's evidentiary hearings to the single issue of whether BSW had been denied all economically viable use of its property during the period that the city improperly denied the demolition permit. BSW argues that it established a permanent taking of its Wilcon Building property in which the city physically invaded the property. In cases of either physical invasion of the land or the destruction of a fundamental attribute of ownership like the right of access, the landowner need not establish the deprivation of *all* economically viable uses of the land. See, *e.g.*, *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1002, 1015, 112 S. Ct. 2886, 2893, 120 L.Ed. 2d 798, 812-813; *State ex rel. OTR v. Columbus* (1996), 76 Ohio St. 3d 203, 667 N.E. 2d 8, syllabus.

Notwithstanding BSW's assertions, appellees established that any alleged taking was not permanent. After the court of appeals' May 1993 judgment holding that BSW should have been granted the certificate of appropriateness for the demolition permit, the city advised BSW that the Landmark Commission would issue a certificate of appropriateness for the requested demolition upon satisfaction of certain ministerial requirements. But BSW refused to seek the demolition permit at that time, although appellees would not have opposed its issuance.

The evidence also established that any alleged taking resulted neither from physical invasion of BSW's land nor destruction of a fundamental attribute of BSW's ownership, such as the right to access public streets or highways on which the land abuts. See, *e.g.*, *Lucas*, 505 U.S. at 1015, 112 S. Ct. at 2893, 120 L.Ed. 2d at 812-813; *OTR*, 76 Ohio St. 3d 203, 667 N.E. 2d 8, syllabus. Dayton's attempts to safeguard the public after BSW essentially abandoned the Wilcon Building did not restrict BSW's ability to access and use the property. And BSW cites no persuasive authority that mandates a holding that the right to demolish a building and construct a new building is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan v. Tigard* (1994), 512 U.S. 374, 384, 114 S. Ct. 2309, 2316, 129 L.Ed. 2d 304, 316 quoting *Kaiser Aetna v. United States*, (1979), 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed 2d 332, 344 (involving issues of access, *i.e.*, the right to exclude others); *OTR* (right of access); see, also, *Corn v. Lauderdale Lakes* (C.A. 11, 1996), 95 F.3d 1066, 1074-1075, where the court held that the developer had to prove that the alleged taking deprived him of all economically viable uses of land because his land had not been physically invaded and he did not "contend that the

right to build a mini-warehouse is a fundamental attribute of ownership."

Therefore, given BSW's failure to properly raise any constitutional issue of whether the Dayton historic preservation ordinances substantially advance legitimate state interests, as discussed *infra*, BSW could only establish entitlement to appropriation proceedings if it established that appellees' denial of the demolition permit denied BSW all economically viable use of the Wilcon Building property. In other words, "in order for the landowner to prove a [regulatory] taking, he or she must prove that the application of the ordinance has infringed upon the landowner's rights to the point that there is no economically viable use of the land and, consequently, a taking has occurred for which he or she is entitled to compensation." *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St. 3d 207, 210, 690 N.E.2d 510, 512.

More specifically, the United States Supreme Court held as follows regarding when the denial of a property-use permit constitutes a regulatory taking:

> "A requirement that a person obtain a permit before engaging in certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, *even if the permit is denied, there may be other viable used available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.*" (Emphasis added.) *United States v. Riverside*

Bayview Homes, Inc.(1985), 474 U.S. 121, 127, 106 S.Ct. 455, 459, 88 L.Ed. 2d 419, 426.

Based on the foregoing, the court of appeals appropriately restricted the scope of its special master's task to resolving the sole issue of whether the denial of the demolition permit deprived BSW of all economically viable use of its property.

Second, the court of appeals did not err by placing the burden of proof on BSW. BSW had the burden of proving entitlement to extraordinary relief in mandamus, including the establishment of a clear legal right to appropriation proceedings because of the deprivation of all economically viable use of the land. See, *e.g., State ex rel. Serv. Emp. Internatl. Union, Dist. 925 v. State Emp. Relations Bd.*(1998), 81 Ohio St. 3d 173, 176-177, 689 N.E. 2d 962, 965; *Goldberg Cos.*, 81 Ohio St.3d at 210, 690 N.E. 2d at 512; *Ketchel v. Bainbridge Twp.* (1992), 70 Ohio App. 3d 174, 179, 607 N.E. 2d 22, 25.

Third, the court of appeals correctly concluded that BSW did not establish a compensable taking. The court of appeals held that the denial of BSW's demolition permit did not deprive it of all economically viable use of the Wilcon Building property. Reviewing courts defer to a lower court's factual determination if it is supported by competent, credible evidence. *State ex rel. Fleming v. Rocky River Bd. of Edn.*(1997), 79 Ohio St. 3d 200, 205, 680 N.E. 2d 981, 984-985.

Here, competent, credible evidence supports the court of appeals' holding. The city's chief building official testified that the Wilcon building is structurally sound and that building tenants would not require new certificates of occupancy if they continued previous tenants' uses. In

addition, at least two-thirds of the building had been used by at least two different businesses for several years just before the denial of the demolition permit, and that portion of the building could have continued to have been used by those businesses if they had not vacated the building. See, *The Shopco Group v. Springdale* (1990), 66 Ohio App. 3d 702, 708, 586 N.E. 2d 145, 150, holding that a "deprivation of * * * economic or development rights does not amount to a denial of all use of one's property, including the rights of possession and use of the property." The property continued to be used for parking and storage after the denial of the permit. Further, any serious hazards that required repair prior to leasing the building existed before the permit denial. Finally, "something more than loss of market value or loss of the comfortable enjoyment of the property is needed to constitute a taking." *State ex rel. Pitz v. Columbus* (1988), 56 Ohio App. 3d 37, 41, 564 N.E. 2d 1081, 1086; see, also, *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*(1987), 482 U.S. 304, 320, 107 S. Ct. 2378, 2388, 96 L.Ed. 2d 250, 267.

Fourth, the court of appeals did not err by refusing to consider BSW's request for a declaratory judgment on the constitutionality of Dayton's historic preservation ordinances. BSW did not request this relief in its complaint and did not amend its complaint to include this claim. When BSW raised this constitutional issue in its initial merit brief and motion for summary judgment in the court of appeals, appellees did not expressly or impliedly consent to litigation of the claim. Therefore, the court of appeals did not need to consider this constitutional claim. *State ex rel. Massie v. Gahanna-Jefferson Pub. Schools Bd. of Edn.* (1966), 76 Ohio St. 3d 584, 589, 669 N.E. 2d 83, 843. BSW does not assert that it properly pled this claim in the court of appeals.

In addition, while the constitutionality of a statute or ordinance may in certain limited circumstances be challenged by mandamus, see *State ex rel Purdy v. Clermont Cty. Bd. of Elections* (1997), 77 Ohio St. 3d 338, 341, 673 N.E. 2d 1351, 1354, courts decide constitutional questions only when "absolutely necessary." *Norandex, Inc. v. Limbach* (1994), 69 Ohio St. 3d 26, 28, 630 N.E. 2d 329, 331. Resolution of the constitutionality of Dayton's historic preservation ordinances was not absolutely necessary here because, as the court of appeals concluded, any alleged taking resulted from the improper denial by appellees of the demolition permit under the pertinent ordinances rather than the unconstitutionality of those ordinances. Therefore, the constitutional issue was not properly before the court of appeals in that the true objective of BSW's request was a declaratory judgment, which the court of appeals lacked jurisdiction to grant. *Wright v. Ghee* (1996), 74 Ohio St. 3d 465, 466, 659 N.E. 2d 1261, 1262. See, *e.g.* BSW's summary judgment motion, where it claimed entitlement to a "declaration of the constitutionality of the [historical preservation ordinances], in whole and/or in part, and in its application to the entire public and/or BSW, under the circumstances at bar or in its general application to all."

Finally, BSW also waived its claim that it was entitled to the requested writ of mandamus because of appellee's fraudulent and intentional misrepresentation by not properly pleading or raising this claim in the court of appeals. *Massie*, 76 Ohio St. 3d at 589, 669 N.E. 2d at 843. Reviewing courts do not consider questions that have not been presented to the court whose judgment is sought to be reversed. *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St. 3d 78, 81, 679 N.E. 2d 706, 709.

Based on the foregoing, the court of appeals properly denied BSW's request for extraordinary relief in mandamus. Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, D.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

THE SUPREME COURT OF OHIO

1998 TERM

BSW Development Group, Appellant,	*	Case No. 98-473
	*	
	*	
	*	RECONSIDERATION
v.	*	ENTRY
The City of Dayton, et al. Appellees.	*	
	*	(Montgomery County)
	*	(Filed 11/18/98)

IT IS ORDERED by the Court that the motion for reconsideration in this case, and hereby is, denied.

(Court of Appeals No. 15186)

s/s THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

BSW DEVELOPMENT GROUP*

Relator * CASE NO. 15186

v. *

THE CITY OF DAYTON, ET AL. *

Respondents

. . . . . .

Rendered on the 23rd day of January, 1998

. . . . . .

PER CURIAM:

On October 15, 1997, the Special Master, Steven C. Hollon, issued his report and recommendations in this matter. He recommended that the petition for writ of mandamus compelling appropriation be denied.

On November 12, 1997, the Relator filed its objections to the Special Master's report and recommendations. On December 1, 1997, the Respondent filed its response to the Relator's objections.

After careful consideration, we overrule the Relator's objections and adopt the actual findings of the Special Master and conclusions of law by him in their entirety. Accordingly, the petition for writ of mandamus is hereby ***DENIED.***

IT IS SO ORDERED.

s/s JAMES A. BROGAN, Judge

s/s WILLIAM H. WOLFF, JR.,
Judge

s/s THOMAS J. GRADY, Judge

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

BSW DEVELOPMENT GROUP * Case No. CA 15186

Plaintiff-Relator * Issued October 15, 1997
*

v.
*

THE CITY OF DAYTON
*

Defendant-Respondent

REPORT AND RECOMMENDATION

This matter is before the court upon a petition for a writ of mandamus filed by relator, BSW Development Group, seeking this court to direct respondent, the city of Dayton, to commence appropriation proceedings regarding certain property owned by relator and located on South Patterson Boulevard in Dayton. In a *per curiam* decision and order issued on March 27, 1996, this court overruled BSW's motion for summary judgment on its petition.

In its ruling, the court framed the pertinent issue as "whether a temporary regulatory taking occurred from October 16, 1989, when the Dayton Board of Zoning Appeals affirmed the Landmark Commission's decision denying a demolition permit, until May 7, 1993, when this court ruled that BSW should receive a permit." *BSW Development Group v. City of Dayton* (March 27, 1996), Montgomery App. No. 15186, unreported. Furthermore, the court found *First English Evangelical Luthern (sic) Church of Glendale v. City of Los Angeles* (1987), 482 U.S.

304, controlling on the issue of whether a temporary, regulatory taking occurred. The court noted that under *First English* the government's conduct must deprive a property owner of "all use" of his property before a temporary, regulatory taking will arise. Also in its March 27, 1996 ruling the court found that a factual dispute existed regarding whether the city's 1989 denial of a demolition permit deprived BSW of all use of the property in question. As a result, the court ordered an evidentiary hearing to be conducted by the undersigned as a special master on that narrow issue. The hearing took place on May 15, May 16, and June 24, 1997. Based upon testimony presented at those proceedings, other evidence before the court, and applicable law, the special master finds that the city's denial of a demolition permit did not deprive BSW of all use of its property. Consequently, BSW has not demonstrated a temporary, regulatory taking of its property, and its petition for a writ of mandamus compelling appropriation should be denied.

I. Findings of Fact

The court's March 27, 1996, decision and order denying summary judgment on BSW's petition includes a thorough review of the facts and circumstances giving rise to the present dispute. Those facts need not be repeated in detail here. Following the court's summary judgment ruling, the only remaining issue is whether the city of Dayton's denial of a demolition permit deprived BSW of all use of its property from October 1989 to May 1993. BSW had sought permission from the city to demolish a structure known as the "Wilcon Building" sited on the property. Testimony presented at the evidentiary hearing established that in the months preceding October 1989 two commercial tenants occupied the Wilcon Building. The Wilcon

Corporation, a construction company owned by Dennis Williams, a BSW partner, occupied approximately one third of the building and paid BSW somewhere between $12,200 and $18,000 annually in rent. The Dayton Tire Company also occupied approximately one-third of the building. It paid BSW about $23,000 annually in rent. These companies had used the Wilcon Building for warehouse and/or office space. Additionally, a third company, Wat-Kem, had occupied a portion of the Wilcon Building until 1985, but no evidence was presented regarding the company's payment of rent.

The parties do not dispute that in January of 1989 the Wilcon Corporation voluntarily vacated the building in anticipation of BSW securing a demolition permit, razing the building, and erecting a new office complex. Based upon the testimony presented at the hearing, the special master also finds that BSW informed Dayton Tire of its intention to demolish the Wilcon Building and that Dayton Tire agreed to vacate the premises by March 1, 1989. After Dayton Tire failed to vacate as promised, however, BSW initiated eviction proceedings against the company in May of 1989, and Dayton Tire subsequently left the property. As a result, when the Dayton Board of Zoning Appeals affirmed the Landmark Commission's denial of a demolition permit on October 16, 1989, the Wilcon Building was empty and, at BSW's request, the Dayton Power & Light Company had discontinued power to the building.

Following the demolition permit denial, Dwight Brannon, a BSW partner, and his associates, stored two wrecked automobiles and a boat in the Wilcon Building. Additionally, from 1989 to the present, BSW has used the Wilcon Building property for public and private parking. More specifically, BSW has utilized the property to create fifty-eight public parking spaces and twenty-eight private spaces for United Way employees. Of the fifty-eight public

parking spaces, approximately thirty were rented at the time of the hearing, with each space generating $25 per month in income. The private spaces were provided to the United Way in conjunction with its lease of space in BSW's adjacent Canal North Building. Consequently, the parking space availability at the Wilcon Building site has assisted BSW in filling space in its other building.

The special master finds credible the testimony from Michael Cromartie, chief building official for the city of Dayton, that following the city's denial of the demolition permit no new certificate of occupancy would have been required before a tenant could occupy the Wilcon Building, provided the new tenant used the same area that the Wilcon Corporation or Dayton Tire had used, and that the new tenant utilized the space in the same way as the former tenants. Cromartie admitted on cross-examination, however, that irrespective of the certificate of occupancy issue, his office would have required any new tenant to correct existing "serious hazards" before occupying the Wilcon building.

Consequently, after the Wilcon Corporation and Dayton Tire vacated the building in 1989, BSW could not have leased space in the Wilcon Building, whether for warehouse or office use, without first repairing certain "serious hazards." In light of this requirement, BSW suggests that it would have been required to spend $457,000 to bring the Wilcon building "up to code." BSW's estimate, however, is an estimate for causing the entire building to meet the specifications in the building code. The special master finds that simply repairing the "serious hazards" in the portions of the building formerly occupied by the Wilcon corporation and Dayton Tire would have cost significantly less and would have allowed BSW to lease those portions of the building to a tenant performing the same function as either Dayton Tire or the Wilcon Corporation. This reduced investment would have

allowed BSW to make the same use of the Wilcon Building as it had before its tenants left and the city of Dayton denied its demolition permit. Bringing the building "up to code" would not have been required if a new tenant had moved into an area for which a certificate of occupancy had been issued and had performed the same function as the former tenants. (Vol. 3, Pgs. 168-170). The only requirement was that serious hazards be corrected. Furthermore, any hazardous conditions in the Wilcon Building existed before the city denied the demolition permit and stemmed solely from BSW's failure to maintain the building and not from the city's permit denial. The city's failure to issue a permit in October of 1989 did not cause any "serious hazards" existing at that time.

Additionally, testimony from John Price, a witness for BSW, revealed that in the 1980s the Wilcon Corporation renovated a portion of the Wilcon Building's third floor, brought that portion of the building "up to code," and used the area for office space. The Wilcon Corporation also used other portions of the building for warehouse and storage space. Likewise, Dayton Tire used a significant part of the building for storage, office space, and service bays shortly before BSW sought the demolition permit. Finally, testimony from the evidentiary hearing established that the Wilcon Building property retained a value of more than $200,000 even after the city denied the demolition permit. The majority of this value, however, rested in the land itself and not the Wilcon Building.

II. Conclusions of Law

In its March 27, 1997, decision and order denying BSW's motion for summary judgment, the court determined that a temporary, regulatory taking exists only when government regulations deprive a property owner of "all use" of his land during the time the regulations are in

effect. As the court recognized, the United Sates Supreme Court in *First English, supra,* determined that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English, supra,* at 321.

The First District Court of Appeals in *The Shopco Group v. City of Springdale* (1990), 66 Ohio App. 3d 702, recognized *First English's* requirement that a temporary, regulatory taking requires a property owner to be deprived of "all use" of his land. The *Shopco* appellants argued that the city's zoning restrictions upon their real estate constituted a taking for the time the restrictions were in effect. The regulations, which ultimately were amended, had prevented the appellants from transforming their property from a park into commercial real estate. The appellants contended "that the property could not be profitably developed in conformance with the zoning restrictions previously in effect, that the restrictions, before their amendment, deprived [the appellants] of the ability to sell or obtain any economic value from the property, and that such a deprivation amounted to a temporary taking of the property."" *Id.* at 704.

Finding the appellant's argument unpersuasive, the Hamilton County Court of Appeals first recognized the general rule that "the application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Id.* at 705. The court then noted that Ohio cases following this rule involved the "*permanent* deprivation of at least a portion of a property owner's use of his property***." *Id.* By contrast, the court found the foregoing "weighing analysis" inapplicable in cases involving temporary, regulatory takings. Instead, the court found *First English, supra,*

applicable to cases involving the *temporary* deprivation of a property owner's rights. *Id.* at 705-706. The *Shopco* court also expressed its inability to locate binding precedent extending "*First English's* remedy of compensation for temporary takings to facts other than a deprivation of 'all uses' of the property." *Id.* at 706.

In light of *First English*, the *Shopco* court subsequently rejected the appellants' takings claim, stating:

> "We also hold that the trial court did not err when it granted summary judgment because there was not before it any evidence that supported the inference that the plaintiffs had been deprived of all use of their property, even though the materials before the court indicated that they may have been deprived of some property rights related to economic development. Although the right to dispose of a piece of property has been described as one of the property rights in a physical thing, along with the right to possess and use it, and the deprivation of rights to develop or to secure reasonable investment-backed expectations have been viewed as subject to compensation in permanent-taking cases, such cases have involved either permanent takings or a physical occupation of property that constitutes a per se compensable taking." A deprivation of such economic or development rights does not amount to denial of all uses of one's property."

Id. at 708 (citations omitted).

Significantly, the *Shopco* court noted that the appellants had used their property as a park before the

city's failure to rezone the area, and they continued to use the area as a park at the time of trial. In addition, the court noted that the property retained value even if the zoning regulations prohibited profitable commercial development. *Id.* Similarly, in *Westendarp, Couch & Co. v. City of Strongsville* (Nov. 10, 1993), Cuyahoga App. No. 63699, unreported, the Eighth District Court of Appeals recognized that "[I]n temporary regulatory taking cases, it is incumbent upon plaintiff to demonstrate the denial of all use of the subject property, not just the reasonable economic use as argued by the appellant." In that case, the Cuyahoga County Court of Appeals rejected the appellant's takings argument, stating:

> "***In the present case, plaintiff failed to fulfill this requirement by not rebutting with proper evidence, the City's motion for summary judgment. Rather than eliciting evidence that all use of the property was denied by the zoning classification, plaintiff argued in opposition to summary judgment that only the construction of offices on the property was unreasonable and impractical given the present market condition for such a project. This argument does not address uses other than office buildings or apartment complexes. At the very least, the owners of the vacant property still retain the continued use and possession of the real estate under the same exact conditions which existed on the date of their purchase."

As in the foregoing cases, the evidence in the present case does not demonstrate that the city's 1989 denial of a demolition permit deprived BSW of "all use" of its land. Although BSW temporarily may have been denied

some property rights related to economic development, as in *Shopco, supra*, such a denial is not tantamount to deprivation of all use. The evidence presented simply does not fulfill *First English's* stringent requirements for temporary, regulatory taking.

To the contrary, the record reveals that BSW rented out substantial space in the Wilcon Building in the months prior to the city's denial of its demolition permit. Without question, BSW had a right to ask those tenants to leave as it prepared to demolish the building. Their presence shortly before October of 1989, demonstrates, however, that portions of the building had been marketable for warehouse or office space and could have been utilized again. Although BSW would have been required to repair existing "serious hazards" before a new tenant occupied the building, the building would not have been required to meet current code standards if a new tenant used space formerly occupied by the Wilcon Corporation or Dayton Tire and performed the same type of work. Consequently, the permit denial did not render the property useless. Moreover, even assuming *arguendo* that repairing the Wilcon Building's "serious hazards" would have proven cost-prohibitive, the city's denial of the demolition permit did not cause the deterioration that existed in 1989. BSW's lack of maintenance, not the city's permit denial, produced the need for "serious hazards" to be repair (sic) prior to re-occupancy. The need for repairs, at least at the time the city denied the demolition permit, is attributable solely to BSW's neglect.

Furthermore, BSW acknowledged using the property to provide public parking and parking for United Way employees who worked in an adjacent building owned by BSW. Even accepting BSW's argument that this use was not "economically viable," it nevertheless constituted some use of the property. As the *Shopco* court recognized, the issue in temporary, regulatory taking cases is whether

the government's action deprives a landowner of "all use" of his property, not whether the government's action interferes with investment-backed expectations or optimal commercial development. Given the temporary nature of the government's interference, a plaintiff seeking damages for a temporary, regulatory taking must demonstrate deprivation of all uses of the subject property before a taking will be found. In the present case, the record reveals that the city's denial of a demolition permit did not deprive BSW of all use of its property. Furthermore, despite denial of the demolition permit, the land itself retained substantial value. For the foregoing reasons, the record does not support finding a temporary, regulatory taking of BSW's property from October 16, 1989 to May 7, 1993.

In opposition to this conclusion, BSW relies largely upon *State ex rel. OTR v. Columbus* (1996), 76 Ohio St. 3d 203. BSW cited *OTR* for the proposition that a taking occurs when the government substantially and unreasonably interferes with a property right. *OTR, supra*, at 206. Additionally, BSW relies upon language in the court's opinion stating that the government's interference "may involve the actual physical taking of property, or it may include the deprivation of an intangible interest in premises." *Id.* Furthermore, BSW notes the court's observation that "[t]he value of property consists in the owner's dominion, use, and disposition for every lawful purpose." *Id.* As the city of Dayton properly notes, however, *OTR* involved a permanent, physical taking when the government constructed an overpass bridge with concrete retaining walls, thereby denying a landowner access to Campus View Boulevard from its properties. The present case, which involves an alleged temporary, regulatory taking is distinguishable and subject to the takings jurisprudence established by *First English, supra*, and the Ohio appellate opinions discussed above. Based

upon those cases, the record does not demonstrate a compensable taking.

III. Recommendation

Accordingly, it is the recommendation of the special master that BSW's petition for a writ of mandamus ordering appropriation should be denied.

Respectfully submitted,

s/s Steven C. Hollon, Special Master

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IN THE COURT OF APPEALS FOR MONTOMGERY COUNTY, OHIO

BSW DEVELOPMENT GROUP*

Plaintiff-Relator * Case No. CA 15186

v. *

THE CITY OF DAYTON * JOURNAL ENTRY

Defendant-Respondent*

. . . . . .

Rendered on the 15th day of October, 1997

. . . . . .

PER CURIAM:

It appearing to the court that the special master appointed to hear this matter has issued his Report and Recommendation this date; and upon due consideration thereof, IT IS HEREBY ORDERED that counsel shall have fourteen (14) days from the journalization of this Journal Entry in which to file objections with the court or this matter shall be approved as filed with the court.

IT IS SO ORDERED.

s/s JAMES A. BROGAN, Judge

s/s WILLIAM H. WOLFF, JR., Judge

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IN THE COURT OF APPEALS FOR
MONTGOMERY COUNTY, OHIO

BSW DEVELOPMENT GROUP :

Plaintiff-Relator :

vs. : C.A Case No. 15186

THE CITY OF DAYTON :

Defendant-Respondent :

.....

DECISION AND ORDER

Rendered on the 27th day of March, 1996.

.....

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Attorneys for Defendant-Respondent

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PER CURIAM:

This matter comes before us upon relator BSW Development Group's (BSW) summary judgment motion seeking a writ of compelling to the city of Dayton to commence appropriation proceedings. BSW also seeks a declaration that a Dayton historical ordinance is unconstitutional. Alternatively, BSW moves this court to reconsider its prior decision in this matter or "remand" the case to the trial court.

BSW's mandamus action stems from its 1984 purchase of real estate located at 2-10 and 16-26 South Patterson Boulevard in Dayton. BSW subsequently demolished the structure located at 2-10 South Patterson Boulevard and constructed a three-story office building in 1988. BSW then applied to the city on March 14, 1989, for a permit to demolish the Wilcon building, which was located at 16-26 South Patterson Boulevard.

The city denied the permit based upon jurisdictional grounds, however, finding that the Wilcon building was eligible for listing on the National Register of Historic Places. The city noted that the Landmark Commission possessed exclusive jurisdiction, pursuant to section 150.45 of Dayton's Revised Code of General Ordinances, to grant or deny demolition permits.

Consequently, BSW applied to the Landmark Commission on March 29, 1989, as directed by the city, for a certificate of appropriateness to obtain a demolition permit. The Wilcon building subsequently become National Register-eligible in May 1989. Thus, contrary to the city's belief, it did possess jurisdiction to consider BSW's initial March 14, 1989, request for a demolition permit. Moreover, when BSW applied to the Landmark Commission on March 29, 1989, the Landmark Commission did not yet possess jurisdiction to consider BSW's application. Not until the

Wilcon building actually became National Register-eligible in May 1989 did the Landmark Commission acquire jurisdiction over BSW's request.

In any event, the Landmark Commission denied BSW's application on July 6, 1989, concluding that rehabilitation of the building was a viable option and, therefore, that the building should not be demolished. BSW appealed the Landmark Commission's decision to the Dayton Board of Zoning Appeals on July 30, 1989. The appeals board affirmed the Landmark Commission's decision on October 16, 1989.

BSW then appealed the Board of Zoning Appeals' ruling to the Montgomery County Common Pleas Court on October 25, 1989, and the trial court declared R.C.G.O. 150.246 unconstitutional. That section outlines the method for obtaining a certificate of appropriateness and a demolition permit from the Landmark Commission. It provides, in relevant part:

> "CONDITIONS OF REMOVAL
> A demolition permit shall not be issued unless accompanied by an approved Certificate of Appropriateness if:
>
> (A) The applicant has given clear evidence that one of the following conditions exist
>
> * * *
>
> (4) The square foot cost of meeting the minimum building code would exceed the square foot market value of similarly used and improved structures in the planning district."

The Montgomery County Common Pleas Court found, *inter alia*, that R.C.G.O. 150.246 constituted a "confiscatory measure which takes its property without just compensation." Consequently, the trial court ruled in its

December 4, 1991, judgment that the ordinance violated the Fifth Amendment to the U. S. constitution.

The Board of Zoning Appeals then appealed the common pleas court's judgment to the this court. We concluded in a May 7, 1993, decision that the trial court need not have addressed the constitutionality of R.C.G.O. 150.246. Instead of considering the constitutional issue, we held that BSW fulfilled the stringent requirements of R.C.G.O. 150.246(A)(4) for obtaining a certificate of appropriateness. Specifically, this court determined that BSW had established: (1) the cost to bring the Wilcon building up to minimum building code requirements was $13.52 per square foot; and (2) the value of similarly used and improved structures in the planning district was $5.00 to $12.74 per square foot. Given these figures, we held that BSW met R.C.G.O. 150.246(A)(4)'s requirements and should have been awarded a demolition permit.

As a result, the city contacted BSW on May 18, 1993, and explained that it would issue a certificate of appropriateness and a demolition permit once BSW complied with the requirements of R.C.G.O. 150.246(B) and (C). Those provisions require an applicant (1) to submit a reuse plan identifying how the property will be used following demolition; (2) to post a performance bond; and (3) to pay a mitigation fee. Pursuant to these provisions, however, the city may waive the bond and mitigation fee if a waiver is requested; and the city expressed its willingness to grant BSW a waiver.

Nevertheless, BSW chose not to submit a reuse plan and seek a waiver. Instead, BSW filed a complaint in the Montgomery County Common Pleas Court on October 18, 1993. The complaint named the city of Dayton, the Board of Zoning Appeals, the Landmark Commission, and a Landmark Commission employee as defendants. On November 16, 1993, however, the defendants removed

BSW's supplemental verified complaint to the U.S. District Court for the Southern District of Ohio, Western Division.

In the federal court litigation, BSW asserted, *inter alia*, a claim under 42 U.S.C. § 1983 and an unconstitutional taking of its property in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. Following a partial summary judgment motion by BSW and a summary judgment motion by the defendants, the district court declared BSW's takings claim not ripe for review. Specifically, Judge Walter Rice concluded that before filing a claim under the Fifth Amendment's Takings Clause, a party must seek a writ of mandamus in state court directing government officials to institute eminent domain proceedings. Given that BSW had not taken advantage of the procedure supplied by Ohio law for obtaining compensation - - a writ of mandamus - - Judge Rice dismissed the takings claim without prejudice.

As a result, BSW initiated the present mandamus action on April 6, 1995, asking this court to direct the city of Dayton to commence appropriation proceedings. BSW subsequently filed a motion for summary judgment on September 21, 1995, and the city filed a memorandum opposing summary judgment on November 2, 1995.[1]

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[1] In addition to their summary judgment motions, the parties have filed numerous other motions since this court's August 21, 1995, decision outlining a schedule for the presentation of evidence and the submission of briefs. In particular, BSW filed a motion in limine on September 26, 1995, seeking to preclude the city from presenting any expert or lay witness testimony because the city failed to identify its witnesses by August 25, 1995, and failed to present any evidence by September 20, 1995, in violation of this court's August 21, 1995, scheduling order. Additionally, the city filed a motion on October 4, 1995, for an extension of time to respond to BSW's summary judgment motion. In response, BSW filed a memorandum opposing the city's motion for a time extension on October 10, 1995. The city

Consequently, we turn now to the merits of BSW's summary judgment motion.

I.

BSW seeks summary judgment that: (1) the city of Dayton is required under Ohio law to commence appropriation proceedings; (2) collateral estoppel applies to an earlier common pleas court decision finding the city liable for taking BSW's property without compensation; (3) regardless of the common pleas court's ruling, the city unlawfully took BSW's property without compensation; and (4) the Dayton historical ordinance described above is unconstitutional.

In its first argument, BSW contends that the city has "a mandatory duty to initiate appropriation proceedings to determine the compensation that is due the Plaintiffs for the wrongful taking of their property." Consequently, BSW urges this court to issue a write of mandamus compelling the city to perform its duty. BSW acknowledges, however, that we first must determine whether its property has been taken without just compensation before issuing a writ ordering appropriation. See *State ex rel. Levin v. City of Sheffield Lake* (1994), 70 Ohio St. 3d 104, 109 (stating that "appropriation proceedings may be compelled through mandamus," but "the court must initially determine that the pertinent property has been appropriated for public use").

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also filed a motion on October 20, 1995, seeking to strike the affidavit of Dwight Brannon, a partner of BSW, and seeking leave to file a brief exceeding twenty-five pages. BSW then filed a memorandum on November 13, 1995, opposing the city's motion to strike Brannon's affidavit. After careful consideration, however, we overrule BSW's motion in limine and the city's motion to strike Dwight Brannon's affidavit. In addition, our decision today moots the city's motion for an extension of time to respond to BSW's summary judgment motion and its motion seeking leave to file a brief exceeding twenty-five pages.

As the following analysis demonstrates, however, we cannot accept BSW's claim that the city appropriated its property without paying just compensation. Therefore, we reject BSW's request for a writ of mandamus compelling appropriation proceedings.

II.

In its second argument, BSW asserts that collateral estoppel applies to the Montgomery County Common Pleas court's December 4, 1991, judgment. As we noted *supra*, the common pleas court's ruling declared the city's historical ordinance a "confiscatory measure" that violated the Fifth amendment to the U.S. Constitution. In particular, the common pleas court reasoned:

> "BSW is required to meet the minimum building code and make repairs to meet the ordinance. The [Board of Zoning Appeals] did not consider any economic return for these repairs to the owners of the building. The ordinance takes the building and deprives the owners of any real use for the structure. The Court finds, under [*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987), 482 U.S. 304], that the Ordinance is a confiscatory measure, which violates the Fifth Amendment, applicable through the Fourteenth."

BSW Development Group v. Dayton Board of Zoning Appeals (Dec. 4, 1991), Montgomery C.P. No. 89-3717, unreported. This court subsequently reviewed the trial court's ruling, however, and found consideration of the constitutional issue unnecessary. Instead, we resolved the issue on statutory grounds. See *BSW Development Group*

v. Dayton Board of Zoning Appeals (May 7, 1993), Montgomery App. No. 13218, unreported (concluding that "BSW fulfilled the stringent requirements of R.C.G.O. 150.246(A)(4) for obtaining a certificate of appropriateness and therefore should have been granted the demolition permit").

Despite our ruling that the trial court need not have addressed the takings issue, BSW claims collateral estoppel attached to the trial court's judgment. In support of its argument, BSW cites *State ex rel. Squire v. City of Cleveland* (1937), 135 Ohio App. 395. In *Squire*, the court explained:

> "The appellant's attempt to avoid the effect of the decision of the District Court is based solely upon the statement in the opinion of the Circuit Court of Appeals that it did not find it necessary to decide whether the collateral for the city's active and inactive accounts also secured the deposits of the Sinking Fund Commission. However, it is universally held that a court speaks by its record or journal and not by its opinions, and nothing contained in the opinion the Circuit Court of Appeals can affect the adjudication of the District Court, unless carried into the judgment of the reviewing court. The judgment of the Circuit Court of Appeals was an affirmance of the judgment of the district Court leaving that judgment in its entirety as a final and binding adjudication of the issues presented."

Id. at 401-02.

Similarly, although we did not address the takings issue in our May 7, 1993, judgment, BSW contends

collateral estoppel flows from trial court's ruling in that case. Given that we affirmed the trial court's decision without modifying it, BSW claims the trial court's takings holding remains in effect.

Although we cannot dispute BSW's interpretation of *Squire*, we decline to follow it. Instead, we find persuasive Judge Rice's reasoning in the related federal court litigation involving BSW and the city. Addressing our review of the trial court's takings ruling, Judge Rice concluded:

> "Although the Court of Appeals expressly held that resolution of constitutional issues was not *necessary*, the Court of Appeals did not vacate that portion of the Common Pleas Court's decision in which it had concluded that there had been a taking without just compensation and a denial of property without due process. Technically, the Court of Appeals' failure to vacate the decision of the Common Pleas Court on the constitutional issues may mean that said decision remains 'on the books.' However, that fact is of no import, because the appellate court expressly concluded that it was not *necessary* for the Common Pleas Court to have reached those constitutional issues; therefore, issue preclusion does not prevent the relitigation of those issues."

BSW Development Group v. City of Dayton (March 23, 1995), S.D. Ohio, No. C-3-93-438.

We believe Judge Rice's reasoning is consistent with Ohio case law concerning the doctrine of collateral estoppel. In *Goodson v. McDonough Power Equipment, Inc.* (1983), 2 Ohio St. 3d 193, for example, the Ohio

Supreme Court noted that collateral estoppel precludes "the relitigation in a second action of an issue or issues that have been actually and necessarily litigated and determined in a prior action." *Id.* at 195, citing *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St. 2d 108. Likewise, in *Bench Billboard Co. v. City of Dayton* (April 10, 1992), Montgomery App. No. 80772, unreported, this court also recognized the rule that "collateral estoppel bars only those issues actually and necessarily determined in the prior litigation."

As we stated in our May 7, 1993, decision, however, the Montgomery County Common Pleas Court need not have addressed the constitutionality of the city's historical ordinance in its December 4, 1991, ruling. In fact, this court expressly stated that consideration of the constitutional issue was not *necessary* for resolution of the parties' dispute. Therefore, we agree with Judge Rice that collateral estoppel does not prevent relitigation of the takings question, and we overrule BSW's motion for summary judgment on the issue.

III.

Regardless of collateral estoppel's applicability, BSW claims in its third argument that the city took its property without paying just compensation. Specifically, BSW argues that through its historical ordinance, R.C.G.O. 150.246, the city has exercised complete dominion and control over the Wilcon building. Consequently, BSW contends the ordinance operates as a permanent taking, a temporary taking, or a physical taking.

A.

In support of its "permanent taking" argument, BSW claims improving the Wilcon building to comply with the historical ordinance would cost hundreds of thousands of dollars and would exceed the building's value. In essence, BSW asserts that requiring it to make substantial

investments in repairs and renovation, over its objections, constitutes a permanent taking.

In light of this court's May 7, 1993, judgment, however, we find BSW's argument unpersuasive. Contrary to BSW's assertions, the partnership no longer is compelled to invest in renovating the Wilcon building. Indeed, as we noted *supra*, BSW now may obtain a demolition permit and demolish the structure. Therefore, we need not consider whether the forced renovation of a commercially useless building constitutes a taking. Such a scenario does not exist in the present case. Instead, BSW's current inability to develop its property flows from its failure to seek a demolition permit following our May 7, 1993, ruling. As the city properly notes, BSW's inaction cannot support an argument that the government has taken its property.

In opposition to this determination, BSW argues that it cannot simply obtain a demolition permit. Indeed, BSW claims it first must "leap a number of hurdles," including (1) presenting evidence of the need for demolition, (2) presenting a reuse plan, and (3) paying the city a mitigation fee. As we noted *supra*, however, the city has agreed to waive any fees, and the only obstacle to BSW's obtaining a permit is its submission of a reuse plan. Furthermore, the city has presented the affidavit of Brian Inderiedden, a Dayton historical preservation officer, who avers that a reuse plan is a ministerial, insubstantial impediment, and that BSW need only identify some potential use for the property, which may include grading and seeding. Consequently, we cannot agree that the city's on-going actions operate as a permanent taking of BSW's property without compensation. BSW is not compelled to undertake costly renovation, and the Wilcon building may be demolished once a reuse plan is submitted.

B.

Alternatively, BSW argues that a temporary taking occurred beginning when the city initially denied its

demolition permit in March 1989 and continuing until the city either grants the permit or permanently takes the Wilcon property.

In support of its argument, BSW cites this court's May 7, 1993, decision in which we concluded that the Landmark Commission should have awarded BSW a certificate of appropriateness to obtain a demolition permit. As explained *supra*, we held that BSW had fulfilled the requirements of R.C.G.O. 150.246 by demonstrating that the square foot value of similarly used and improved structures in the planning district was less than the anticipated cost of improving the Wilcon building to meet minimum building codes.

Consequently, by fulfilling the requirements of R.C.G.O. 150.246, BSW contends it established conclusively that renovating the Wilcon building was not an economically feasible option. Furthermore, BSW claims demolishing the building was not an option after the city denied its requested demolition permit in 1989. Given these two circumstances, BSW asserts that the city denied it all economically viable use of the Wilcon property in 1989 and, as a result, "took" its property. In addition, BSW argues that a taking will continue until the city ultimately awards it a demolition permit.

As we explained above, however, BSW's current lack of a demolition permits stems from its failure to submit a reuse plan. Following this court's May 7, 1993, decision, no other impediment prevented BSW from obtaining a permit, demolishing the building, and undertaking any use it desired. Consequently, we cannot agree that a taking of BSW's property continues to the present day. Instead, we believe the issues is whether a temporary regulatory taking occurred from October 16, 1989, when the Dayton Board of Zoning Appeals affirmed the Landmark Commission's decision denying a demolition

permit, until May 7, 1993, when this court ruled that BSW should receive a permit.

We find the former date proper because at that time "the government entity charged with implementing the regulations [had] reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Commission v. Hamilton Bank* (1985), 13 Cl. Ct. 555, 558, *aff'd.* 859 F.2d 893 (Fed. Cir. 1988), citing *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121 126-27; *Conant v. United States* (1987), 12 Cl. Ct. 689, 691. Therefore, in the present case we conclude that a taking could not have occurred until October 16, 1989, when the Dayton Board of Zoning appeals refused to grant a demolition permit. At that time, the city's decision became final, forcing BSW to seek judicial review.

Of course, the mere denial of a building permit or a demolition permit does not constitute a taking of property. The U.S. Supreme Court addressed this issue in *Riverside Bayview Homes, supra,* at 126-27 (emphasis added), stating:

> "Moreover, we have made it quite clear that the mere assertion of regulatory jurisdiction by a government body does not constitute a regulatory taking. See *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 293-297 (1981). The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that the permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is

> denied, there may be other viable uses available to the owner. *Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."*

In the present case, the denial of BSW's demolition permit from October 16, 1989, until our decision on May 7, 1993, is undisputed. Therefore, the true question is whether this denial precluded BSW's "economically viable" use of the Wilcon property. In *Riverside Bayview Homes*, the U.S. Supreme Court noted that whether a permit denial constitutes a taking depends upon the owner's ability to put the property to productive use. *Id.* at 127 n. 4. Furthermore, in *First English Evangelical Lutheran Church of Glendale, supra*, at 321-22, the Court stated that an ordinance must eliminate *all use* of property before a temporary taking may be found. In cases, however, "where the government's activities have already worked a taking of *all use* of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321 (emphasis added).

As noted *supra*, BSW contends the city precluded all economically viable use of its property by denying a demolition permit. Specifically, BSW claims this court's May 7, 1993, decision establishes conclusively that renovation of the Wilcon building was not an economically viable choice when the Landmark Commission and the Dayton Board of Zoning Appeals denied BSW's permit request in 1989. Properly applied, BSW contends, the city's own ordinance demonstrates that the square-foot cost of renovating the property exceeded the square-foot value of similar structures in the area. In addition, once the city denied the demolition permit, razing the building no longer

represented a viable option. Consequently, BSW claims from 1989 until our ruling 1993, the city's actions forced it to chose (sic) between renovating the property and enduring a sure financial loss or letting the property remain unoccupied. In BSW's view, neither option represented an "economically viable" choice. Therefore, it contends the city effectively prevented all use of the Wilcon building and rendered the property worthless.[2] In its motion for summary judgment, BSW contends:

> "The Wilcon building 'as is' is valueless, as it has been during the entire administrative and legal process culminating in the decision by the Court of Appeals. It cannot house people without extensive renovation and the building is in violation of building code standards. The expenditures required by the City and its Historic Ordinance make the Wilcon building property valueless as is, and make use of it economically unfeasible."

BSW Summary Judgment Motion at 8.

In addressing BSW's claim, we are mindful that a regulatory taking does not arise simply because an ordinance denies a landowner of the most profitable use of his property or causes a decline in the property's market value. *State ex rel. Pitz v. City of Columbus* (1988), 56 Ohio App. 3d 37, 41. Clearly, demonstrating a mere

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[2] Although BSW retained the Wilcon property following the permit denial in essentially the same condition as when purchased, BSW claims the city's determination that the Landmark Commission possessed jurisdiction over the parcel, and the commission's subsequent permit denial, eviscerated the property's value, rendering the plot nearly worthless.

reduction in profits will not sustain a takings claim. *Monfort Supply Co. v. City of Cheviot* (Sept. 27, 1995), Hamilton App. No. C-940898, unreported.

After reviewing the evidence presented and relevant case law, we cannot agree, as a matter of law, that the temporary denial of a demolition permit deprived BSW of all use of its land in the interim. BSW has not demonstrated that the denial resulted in its property losing all rental value or resale potential. Consequently, the evidence presented does not establish that the permit denial rendered BSW's property valueless.

In fact, the testimony from the Landmark Commission's hearing on BSW's demolition request reveals that the Wilcon property had been used a commercial warehouse prior to BSW's application permit. Moreover, at the time of the Landmark Commission's July 6, 1989, hearing, the Wilcon building retained an "as is" value of two-hundred and twenty thousand dollars.
Nevertheless, BSW asserts in an affidavit that when it initially sought a demolition permit, it had devised a development plan for the property and secured a four-hundred and fifty thousand dollar offer for part of the land. As a result of the substantial delays in securing a demolition permit, however, and the uncertainty surrounding the property's historical status, BSW claims its property is now unmarketable. Additionally, BSW contends demolition costs for the property have doubled since 1989.

Despite these unfortunate economic circumstances, we cannot agree that the city's conduct constituted a taking of BSW's property. Prior to its application for a demolition permit, BSW utilized the Wilcon building as a warehouse, and presumably it could have continued doing so after the city denied its permit. At the time of BSW's permit application, the Wilcon building allegedly retained an "as is" value of two-hundred and twenty thousand dollars.

Consequently, BSW has not demonstrated that the city's permit denial precluded "all use" of the property. Therefore, pursuant to *First English, supra*, BSW has not established a temporary regulatory taking of its property.

C.

Finally, BSW asserts that the city physically has taken its property. In support of this argument, BSW claims the city has secured the Wilcon property, ordered BSW and others not to trespass on the property, and threatened civil and criminal sanctions based upon the building's hazardous condition. BSW then argues that any such physical occupation, no matter how small or insignificant, constitutes a taking of private property requiring just compensation.

We reject BSW's argument, however, because BSW has presented no evidence supporting its claim that the city has denied it access to the building. Conversely, the city has presented the affidavit of Stephen Baker, a city conservation supervisor, who states that the city secured the building based upon public safety concerns. Furthermore, Baker explains in his affidavit that BSW's partners were not prevented from entering the building. In fact, he claims the partners were provided keys to the padlocks securing the Wilcon building. Based upon these facts, we find meritless BSW's argument that the city's actions constitute a physical taking.

IV.

In its final argument, BSW claims this court should issue a declaratory judgment that the city's historic ordinance is unconstitutional, in whole or in part, either on its face or as applied in the present case. In support of its argument, BSW contends this court "has the inherent power to grant a declaratory judgment where it is necessary to the determination of the mandamus action or to provide complete and timely relief."

However, we decline BSW's invitation to issue a declaratory judgment on the constitutionality of the city's historical ordinance. In so doing, we note the BSW never sought declaratory relief in its April 6, 1995, complaint in mandamus. Instead, BSW prayed only for a writ of mandamus to compel the city's initiation of appropriation proceedings. Therefore, BSW cannot now seek summary declaratory judgment.

Furthermore, this court lacks the authority to issue a true declaratory judgment in a mandamus action. In *State ex rel. Neer v. Industrial Commission of Ohio* (1978), 53 Ohio St. 2d 22, the court found declaratory judgment improper in a mandamus action brought before the court of appeals. Specifically, the *Neer* court explained that appellate courts lack original jurisdiction to render declaratory judgment. The *Neer* court reasoned:

> "Although R.C. 2721.02 gives all 'courts of record' the power to render declaratory judgments, the 1968 Modern Courts amendment gives the Court of Appeals original jurisdiction only in quo warranto, mandamus, habeas corpus, prohibition, procedendo, and in any cause on review as may be necessary to its complete determination. Section 3(B)(1)(a)-(f), Article IV of the Ohio Constitution. Permitting a Court of Appeals to give what is basically a declaratory judgment is to expand its constitutionally declared jurisdiction."

Id. at 23-24. See also *State ex rel. Coyne v. Todia* (1989), 45 Ohio St. 3d 232, 237 (noting that "courts of appeals have no jurisdiction to hear declaratory judgment actions

because that would extend their constitutionally declared jurisdiction over original actions"). Thus, where an action is in the form of mandamus, but the relator's true objective is a declaratory judgment, an appeals court lacks original jurisdiction. *State ex rel. Governor v. Taft* (1994), 71 Ohio St. 3d 1,3 (stating that the relator's request for relief "has no merit in mandamus or prohibition and is also a thinly disguised request for a declaratory judgment, which we are without jurisdiction to grant").

At the same time, however, we recognize that mandamus remains an appropriate vehicle to challenge the constitutionality of a legislative act. *State ex rel. Zupancic v. Limbach* (1991), 58 Ohio St. 3d 130, 133; *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 608 (stating that "[t]he right of relator to question, by mandamus, the constitutionality of the statute is recognized in Ohio").

The critical inquiry is whether consideration of the constitutional issue is necessary for resolution of the mandamus action. Where a mandamus action necessarily implicates an underlying constitutional issue, an appellate court may resolve the constitutional question. Thus, a relator may question the constitutionality of a statute upon which the respondent relies to justify its refusal to act. In *State ex rel. Brown v. Summit County Bd. of Elections* (1989), 46 Ohio St. 3d 166, for example, the court allowed a mandamus challenge to the constitutionality of a city durational residency requirement for city council candidates. In so doing, the court explained:

> "The board of elections in this case was merely following the residency requirement of the Stow Charter and, at the time of its ruling, had no clear duty to place the name of the relator on the ballot because it could not declare a city charter section unconstitutional. However, if we determine

> that the charter section in question is unconstitutional, then the duty of the board of elections to place the name of the relator on the ballot will relate back *** and a writ of mandamus will properly issue."

Id. at 168.

Similarly, in *Zupancic, supra*, the court explained the rationale behind allowing constitutional issues to be addressed in mandamus. The court reasoned:

> "In the present case relators would have a clear right to have respondent proceed under the former apportionment formula if we found R.C. 5727.15(C), in its present form, unconstitutional. Although relators could seek a declaratory judgment coupled with a mandatory injunction in order to achieve nearly the same result we find that the alternative remedy would not be as complete as a writ of mandamus. Ultimately, if any court would declare R.C. 5727.15(C) unconstitutional, the relators could still be forced to request a writ of mandamus in order to have respondent follow the apportionment formula requested in their complaint and/or a prohibitory injunction to enjoin respondent from exercising her statutory duties under the challenged statute. Accordingly, we hold that relators have properly brought this mandamus action before the court since all alternative remedies at law are wholly inadequate."

Id. at 133-34; See also *Michaels, supra*, at 608; *State ex rel. McKell v. Robins* (1905), 71 Ohio St. 273; *Young Israel*

Organization of Cleveland v. Dworking (1956), 105 Ohio App. 89, 95 (recognizing that "the constitutionality or validity of the zoning enactment relied upon as ground for refusing a permit may be raised in a proceeding in mandamus to compel the issuance of a permit").

In the present case, however, the constitutionality of the city's historical ordinance is not vital to our disposition of BSW's mandamus action. In essence, BSW claims the historical ordinance operates to take its property. Therefore, it seeks a writ of mandamus compelling the city to initiate appropriation proceedings. Conversely, the city contends its ordinance does not take BSW's property. Significantly, our resolution of this dispute does not depend upon a preliminary assessment of the historical ordinance's constitutionality. Indeed, any perceived constitutional infirmity is irrelevant to whether an uncompensated taking occurred.

Consequently, we cannot accept BSW's argument that declaratory judgment on the ordinance's constitutionality is necessary to resolution of its mandamus action. Therefore, we hold that BSW's request has no merit in mandamus because it is a pure request for declaratory judgment, which this court is without jurisdiction to grant in an original action. See *Coyne, supra,* at 237; *State ex rel. Governor v. Taft, supra*, at 3.

Alternatively, BSW asks this court to reconsider its May 7, 1993, judgment and review the Montgomery County Common Pleas Court's December 4, 1991, determination that the city's historical ordinance is unconstitutional.

As the city properly notes, however, if BSW planned to seek reconsideration of our 1993 ruling, it should have filed an application for reconsideration, pursuant to App. R. 26, within ten days of our decision. BSW never made such a request, and it cannot seek

reconsideration now. Accordingly, we reject BSW's request for reconsideration of our prior ruling.

Finally, BSW claims we should "remand" this cause to the common pleas court for resolution of all issues, including the complaint in mandamus. However, BSW fails to explain how this court can "remand" its complaint in mandamus, which is an original action filed in this court. Given that the action originated in this court, "remand" is an impossibility. Therefore, we reject BSW's request for a remand.

V.

Based upon our threshold determination that BSW has not established a permanent, temporary, or physical taking of its property, we overrule the relator's summary judgment motion seeking a writ of mandamus to compel appropriation proceedings. Additionally, we decline the relator's invitation to declare the city's historical ordinance unconstitutional, reconsider our prior decision in this matter, or "remand" this case to the common pleas court.

In light of the evidence presented, however, we are unprepared to declare that the city has not taken BSW's property. Instead, we hold only that BSW has failed to demonstrate, as a matter of law, that the city's permit denial constituted a taking of its property. As we noted *supra*, testimony before the Landmark Commission suggests that the Wilcon building retained a two-hundred and twenty thousand dollar "as is" value when BSW applied for a demolition permit. Furthermore, the record suggests that BSW utilized the property as a commercial warehouse in the months before it sought a demolition permit. Nevertheless, BSW contends in an affidavit filed by Dwight Brannon that the permit denial rendered the property unmarketable and valueless. See Affidavit of Dwight Brannon, July 5, 1995.

Consequently, it is hereby ordered that an evidentiary hearing shall be held before a designated special master, Steven C. Hollon, Administrator of the Second District Court of Appeals, at a time to be set by the administrator. It is further ordered that the hearing will address only the following issue: whether the city's 1989 denial of a demolition permit deprived BSW of all use of its property.

s/s JAMES A. BROGAN, Presiding Judge

s/s WILLIAM H. WOLFF, JR., Judge

s/s THOMAS J. GRADY, Judge

Copies mailed to:

Dwight D. Brannon
Ronald J. Maurer
Jane Lynch
Neil F. Freund

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

BSW DEVELOPMENT GROUP, et al. :

Plaintiffs-Appellants :C.A. Case No. 13218

vs. :T.C. Case No. 89-3717

DAYTON BOARD OF ZONING APPEALS :

Defendant-Appellant :

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OPINION

Rendered on the 7th day of May, 1993

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. . . . . .

BROGAN, J.

The Dayton Board of Zoning Appeals appeals from the judgment of the Montgomery County Court of Common Pleas finding Section 150.245(A)(4) of the Revised Code of General Ordinances unconstitutional.

The facts of this case are as follows. The Wilcon Building, located at 16-26 South Patterson Boulevard, is a warehouse dating from the late nineteenth century. It is one of the last remaining structures standing along the route of what used to be the Miami-Erie Canal.

In late 1984, BSW Development Group (BSW), a general partnership consisting of Dwight Brannon, William Schoenfeld, and Dennis Williams, purchased the real estate located at 2-10 and 16-26 South Patterson Boulevard for development purposes. BSW demolished the structure located at 2-10 South Patterson Boulevard and constructed a three story office building in 1988.

On March 14, 1989, BSW applied to the City of Dayton, Department of Urban Development, Division of Inspectional Services for a permit to demolish the Wilcon Building. However, the permit was denied on jurisdictional grounds. Specifically, the department found that because the Wilcon Building was eligible for listing on the National Register of Historic Places (National Register), the Landmark Commission had exclusive jurisdiction to grant or deny demolition permits pursuant to Section 150.45 of the Revised Code of General ordinances (R.C.G.O.). See, also, R.C.G.O. 44.55.

The National Register is a listing of structures, districts, sites, buildings and objects worthy of preservation maintained by the National Park Service, U.S. Department of Interior. Properties are added to the National Register in several ways, including nominations prepared under approved state historic preservation programs. See Section 60.1, Title 36, C.F.R.

The Wilcon Building became National Register eligible in May, 1989. At all times during the process for eligibility, BSW objected to the potential listing of the Wilcon Building on the National Register.

On March 29, 1989, BSW applied to the Landmark Commission for a certificate of appropriateness to obtain the required demolition permit pursuant to R.C.G.O. 150.246. The Commission denied BSW's application on July 6, 1989, concluding that rehabilitation of the building was a viable project and that therefore the building should not be demolished. BSW appealed the Landmark Commission's decision to the Dayton Board of Zoning Appeals (Board) on July 20, 1989. The Board affirmed the Landmark Commission's decision on October 16, 1989.

On October 25, 1989, BSW appealed the decision of the Board to the Montgomery County Court of Common Pleas.

The trial court's judgment, issued on December 4, 1991, found the ordinance to be unconstitutional, stating that (1) the Landmark Commission did not make a finding as to whether BSW would realize a reasonable return on its investment for repairs, and (2) the ordinance did not provide notice to a landowner of the unilateral filing of his property on the Ohio Historic Inventory nor does it provide a means of informing the public that a building is subject to the Landmark Commission's control. The Board filed its notice of appeal on January 2. 1992.

The Board advances one assignment of error, asserting that the trial court abused its discretion in finding the ordinance unconstitutional. The National Trust for Historic Preservation in the United States and Preservation Dayton, Inc. were permitted to enter as amici and file a brief in support of the appellee. The University of Dayton School of Law filed an amicus brief in support of the appellant.

It is well established that a court is not permitted to pass upon the constitutionality of a statute unless such a determination is necessary to its decision. State v. Collins (1977), 60 Ohio App. 2d 116, 120.

In State v. Deskins (April 16, 1992), Champaign App. No. 92 CA 23, unreported, we reiterated the role of appellate courts when confronted with constitutional issues:

> ***It is a general rule of appellate review that constitutional issues should not be decided unless absolutely necessary. See In re Boggs (1990), 50 Ohio St. 3d 217, 221; In re Miller (1992), 63 Ohio St. 3d 99, 110.

Although both parties in the instant case present their respective arguments within a constitutional framework, we find that this case can be disposed of without engaging in

any consideration of constitutional questions. See 16 Ohio Jurisprudence 3d, Constitutional Law Section, 122, 254.

In affirming the Landmark Commission's denial of BSW's application for the certificate of appropriateness, the trial court apparently found that BSW had fulfilled the requirements of R.C.G.O. 150.246. R.C.G.O. 150.246 provides, in part, that:

> The Landmark Commission may only approve a Certificate of Appropriateness if: (A) The applicant has given clear evidence that one of the following conditions exist:
>
> * * *
>
> (4) The square foot cost of meeting the minimum building code would exceed the square foot market value of similarly used and improved structures in the planning district.

According to the unchallenged appraisal ordered by the Landmarks Commission and prepared by the J.R. Remick Company, the Wilcon Building encompasses 33,808 square feet.

BSW submitted uncontroverted evidence that the cost to bring the Wilcon Building up to minimum building code requirements would be $457,000, and to bring it into leaseable condition would be $1,214,660.

Applying these figures, the cost to meet minimum building code requirements for the Wilcon Building would be $13.52 per square foot. ($457,000 divided by 33,808). Thus, in order to obtain a certificate of appropriateness pursuant to the provisions of R.C.G.O. 152.146(A)(4), BSW would need to establish the square foot value of similarly used and improved structures in the planning district is less than $13.52 per square foot.

J.R. Remick utilized three different approaches to render an appraisal of the Wilcon Building, two of which address market value and are therefore directly relevant to the determination of whether the requirements of R.C.G.O. 152.246(A)(4) have been met. In both those approaches, J.R. Remick investigated similar properties situated near the Wilcon Building. The square foot price of these buildings ranged from $5.00 to $12.74 per square foot.

Thus, the evidence set forth in J.R. Remick's report reveals that the square foot cost of similarly used and improved structures in the area is well below the $13.52 per square foot improvement cost of the Wilcon Building. Therefore, the requirements of R.C.G.O. 152.246(A)(4) have been met and BSW should have been granted the certificate of appropriateness and a demolition permit.

Nevertheless, the Board maintains that the denial of the certificate of appropriateness was proper because the trial court should have included the adjacent parcel in its application of R.C.G.O. 152.246(A)(4) pursuant to the "parcel as a whole" theory set forth in Penn Central Transp. Co. v. City of New York (1978), 438 U.S. 104. We find find (sic) this contention to be without merit for several reasons.

First, we find that the language of R.C.G.O. 150.230 et seq, does not expressly require including adjacent property or other property owned by the landowner in determining whether the square foot market value of similarly used and improved structures in the planning district.

Second, the facts and issues in Penn Central, supra, are distinguishable from this case. In Penn Central, the Supreme Court was not construing R.C.G.O. 150.230 et seq, but was determining whether the application of the Landmarks Preservation Law restricting the development of the Grand Central Terminal constituted a taking in violation of the Fourteenth Amendment.

In Penn Central, the entire city tax block was designated as a landmark site. Id. at 131. Moreover, the Grand Central Terminal was a participant in the transferable development-rights program, which afforded Penn Central additional valuable rights with respect to the adjacent property.

In the instant case, the adjacent property purchased by BSW has not been designated as a landmark site. Nor was any evidence presented that the Wilcon Building added to the value or drew customers to the adjacent property as it did in Penn Central. Additionally, the Wilcon Building does not afford BSW transferable development rights. Therefore, the trial court correctly focused only on the Wilcon Building and did not evaluate the adjacent parcel.

For the aforementioned reasons, the appellant's assignment of error is overruled.

We further note that the state and federal laws are less restrictive than is the Revised Code of General Ordinances with respect to a landowners' rights vis-à-vis property which has been declared eligible as an historical landmark. Specifically, R.C. 149.55 states that:

> ***The [Ohio historical] society shall not place any land on the registry without first obtaining a written agreement with the landowner that subjects the land to the provisions of this section***.

Thus, unless a landowner agrees in writing to place his land on the state registry, the historical preservation laws are not applicable to his property and may not restrict the use of his land.

With respect to the National Register, Section 470(a), Title 16, U.S. Code states that:

> If the owner***of any privately owned property***objects to such inclusion or designation, such property shall not be included on the National Register or

designated as a National Historic Landmark until such objection is withdrawn.

Furthermore, listing of private property on the National Register "does not prohibit under Federal Law or regulations any actions which may otherwise be taken by the property owner with respect to the property." Section 65, Title 36, C.F.R.

In conclusion, BSW fulfilled the stringent requirements of R.C.G.O. 150.246(A)(4) for obtaining a certificate of appropriateness and therefore should have been granted the demolition permit.

The judgment of the Montgomery County Court of Common Pleas will be affirmed.

. . . . . .

GRADY, P.J. and FAIN, J., concur.

Copies mailed to:

Dwight D. Brannon
J. Anthony Sawyer
Neil F. Freund
Lisa A. Hesse
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Andrea C. Ferster
Claire Prechtel-Kluskens
Hon. Lee A. Bixler

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO CIVIL DIVISION

BSW DEVELOPMENT GROUP, et al.

CASE NO.89-3717

Appellants

(Judge Bixler-
by assignment)

vs.

DAYTON BOARD OF ZONING APPEALS

Appellees

JUDGMENT ENTRY
(Filed 12/04/91)

Case No. 89-3717 is an administrative appeal from the decision of the Dayton Board of Zoning appeals which affirmed the order of the Landmark Commission denying a demolition permit to BSW. This case was submitted upon the record of the proceedings before the Landmark Commission and the Board of Zoning Appeals, as supplemented, pursuant to the earlier order of this Court. In the administrative appeal, BSW challenges the constitutionality of the revised Historic District Ordinances of the General Ordinances of the City of Dayton, Ohio. The facts giving rise to this appeal are relatively simple.

In 1984, a general partnership consisting of Dwight Brannon, Dennis Williams and William Schoenfeld (BSW) purchased real estate located at 16-26 S. Patterson Blvd. and real estate located at 2-10 S. Patterson Blvd. for development purposes. Both parcels contained older buildings which BSW intended to demolish. The City of Dayton granted BSW a demolition permit for the building

located at 2-10 S. Patterson Blvd. and that building was removed. A new office building was constructed on the site in 1988 and is occupied, in part, by Brannon's law office.

On March 14, 1989, BSW applied to the City's Division of Inspectional Services for a demolition permit for the building located at 16-26 S. Patterson. The permit was refused because the request was required to be presented to the Dayton Landmark Commission. The building was eligible for listing on the National Register of Historic Places and fell within the Landmark Commission's jurisdiction. The Landmark Commission attained the jurisdiction by means of an Ordinance, 150.45, enacted in 1988. The Ordinance provides that no demolition permit shall issue for a qualified building until the applicant has complied with the provisions of 150.45 R.C.G.O., the Historic District Ordinance, which was also amended in 1988. Under the Ordinance, the Landmark commission has jurisdiction to grant or deny a demolition permit if the building was landmark eligible or listed on the Ohio historical inventory (OHI) as eligible. The OHI form listing the building was originally filled by the City in 1985 and revised in 1989 and 1990, while the permit application was pending. The Ordinance does not require that the owner of the property be notified of the filing and BSW had no knowledge that the OHI form had been filed.

Nevertheless, BSW filed for a certificate of appropriateness under RCGO 150.246(A)(4). That Section permits demolition of the building if the square foot cost of meeting the minimum building code would exceed the square foot market value of similarly used and improved structures in the planning district. The Landmark Commission held several hearings on the application and the transcripts, although almost impossible to read in places, have been filed. The Commission accepted BSW's cost figures for rehabilitation and concluded that the

rehabilitation of the building was a viable project. Consequently, it denied BSW's application for demolition of the building.

On July 20, 1989, BSW filed an appeal from the decision of the Landmark Commission to the Dayton Board of Zoning Appeals (BZA). Under the terms of the Historic District Ordinance, the decision of the Landmark Commission denying the demolition permit was final. The BZA only had jurisdiction over procedural errors which might have occurred before the Landmark Commission. The transcript reveals that BSW tried to reargue the merits of their case before the BZA which refused to hear that argument. On November 6, 1989, the BZA found that the Landmark Commission had not committed any procedural errors which substantially impaired the rights of BSW. The order of the Landmark Commission denying the certificate of appropriateness was affirmed. On October 25, 1989, BSW appealed to the Montgomery County Court of Common Pleas, pursuant to ORC 2506.03.

I

In an ORC administrative appeal, the Court must apply the law to the evidence presented to the administrative agency, consider the additional evidence admitted pursuant to ORC 2506.03 and determine whether the decision of the agency is supported by reliable, substantive and probative evidence. The Court may find the administrative order to be unconstitutional, illegal, arbitrary, capricious, unreasonable, or not supported by the evidence. 2506.04. BSW contends that the BZA erred in affirming the decision of the Landmark Commission because there did not exist a preponderance of reliable, probative and substantive evidence to support the decision.

BSW first argues that it sustained proof that BSW was entitled to a demolition permit. §150.245(a)(4) of the

Ordinance was the section BSW relied upon for the granting of the demolition permit

> "CONDITION OF REMOVAL
> A demolition permit shall not be issued unless accompanied by an approved Certificate of Appropriateness. The Landmark Commission may only approve a Certificate of Appropriateness if:
>
> (A) The applicant has given clear evidence that one of the following conditions exist:
>
> (4) The square foot cost of meeting the minimum building code would exceed the square foot market value of similarly used and improved structures in the planning district."

This section provides the method whereby an applicant may obtain a Certificate of Appropriateness and demolition permit. The Applicant must prove that the square foot cost of meeting the minimum building code would exceed the square foot market value of similar buildings. This requirement ignores the right of the land owner to realize a "reasonable return" on its investment for repairs. Penn Central Transp. Co. v. New York City 438 U.S. 104 (1978). In that case, the Court found that New York City's Landmark Preservation Law was constitutional because it did not interfere with Penn Central's right to realize a reasonable return on its investment. Consequently, the Landmark law did not constitute a taking of Penn Central's property without compensation.

The transcript indicates that the Landmark Commission had an appraisal of the building as it presently stands. The BSW building was appraised at $220,000.00. BSW estimated the costs of bringing the building to meet minimum building code standards was $457,000.00. BSW

further estimated that to bring the building into a leaseable condition would require an investment of $1,214,660.00. There was no finding by the Landmark Commission that BSW would realize any reasonable return on its investment for repairs. The Court finds this to be a defect in the ordinance, as it is presently drafted.

II

BSW contends that the Landmark Commission and the BZA denied it due process under the ordinance. The ordinance permits a building to be listed on the Ohio Historical Inventory without the consent of the owner. The ordinance does not require any notice to the owner. It is not necessary that the structure be located within a historical district. The ordinance provides no means of informing the public that the building is subject to the Landmark Commission's control. Other ordinances provide for treating the historical designation as a mortgage, so that the public is aware that the building has historic signifigance (sic) and is subject to the City's control. (See BSW's exhibits 51152).

On March 14, 1989, when the application for the demolition permit was made, there was no record in the real estate records that the property was designated as a historical landmark or was eligible for historic designation. The supplemental evidence indicates that the City applied for historical status for the building in May, 1989, after application for the permit was filed. BSW's Exhibit 5 indicates that the City applied for registration of the property with the U.S. Department of the Interior on July 17, 1989. It is apparent that the City was working backwards to gain historic status for the building only after the demolition permit application was filed. This action denies the landowner due process and the right to a fair hearing before the Commission. The ordinance is defective

as it does not provide notice to the landowner of the unilateral filing for historic status.

III

BSW finally argues that the ordinance is a confiscatory measure which takes its property without just compensation. First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1978) involved the imposition of an ordinance which prohibited building on an interim flood protection area. The church had maintained "Luther-glen", a retreat for handicapped children, on the site. After a flood, the church was forbidden to rebuild its buildings. The Court found this to be inverse condemnation and a taking without just compensation.

The application of the ordinance to BSW's property acts in the same manner. BSW is required to meet the minimum building code and to make repairs to meet the ordinance. The BZA did not consider any economic return for these repairs to the owners of the building. The ordinance takes the building and deprives the owners of any real use for the structure. The Court finds, under First Lutheran Church, that the Ordinance is a consfiscatory measure, which violates the Fifth Amendment, applicable through the Fourteenth.

IV

As noted, the Court is limited to determining if the Ordinance has any reasonable relationship to the City's police power. There is no doubt that a municipality may regulate the use of real estate within its boundaries by means of land use regulations. The land use ordinance must relate to a public benefit or purpose. The city claims an interest in preserving historical sites within the municipality as these sites may be lost forever by demolition or remodeling.

In this case, however, the Historical District Ordinance grants almost unlimited power to the Landmark Commission over demolition permits. The standards for exemption are vague and do not include any concept of economic feasibility. When the Ordinance was enacted, BSW's building was considred (sic) to have no historical signifigance (sic) for the City. The area was rejected as a historical district several years earlier. The City, without notice or consent, made the building eligible for historic status. Under the Ordinance, BSW is now faced with a million dollar renovation with no expectation of any return.

The actions of the Landmark commission and BZA are reflected by the record of the administrative appeals have denied BSW due process and equal protection of the laws.

Pursuant to the standard of review set forth in ORC 2506.04, the Court finds the Historic Ordinance to be unconstitutional as it applies to the property owned by BSW. The Court further finds that the decision of the Landmark Commission, as affirmed by the BZA, is not supported by reliable, probative and substantial evidence. The decision of the BZA is reversed as to the BSW property. Costs taxed to the BZA.

s/s LEE A. BIXLER, Judge

cc: Dwight D. Brannon, Attorney for Appellants
Six South Patterson Blvd., Suite 300
Dayton, Ohio 45402

Steve Milby, Attorney for City of Dayton

Jane Lynch, Attorney for City of Dayton

REVISED HISTORIC DISTRICT ORDINANCE

CITY OF DAYTON, OHIO
SEPTEMBER 1988

TABLE OF CONTENTS

Revised Historic District Ordinance Cover Memo 1

Section 44.50 Landmark Commission Established ...3

Section 44.51 Membership of the Landmark Commission 3

Section 44.52 Terms of Office.....4

Section 44.52 Removals and Vacancies 4

Section 44.55 Organization and Rules.....4

Section 44.57 Landmark Trust Account 5

Section 150.45 National Register Structures and Sites.....7

Sections 150.230-150.2599 Historic District Ordinance.....9ff

HD-1 Preservation Overlay.....10

HD-2 Landmark Overlay 11

August 23, 1988

TO: Donald L. Crawford
Clerk of Commission

FROM: Paul R. Woodie
Secretary to the City Plan Board

SUBJECT: Revised Historic District Ordinance

On September 21, 1988 the City Commission will hold the final public hearing on the revised ordinances governing historic preservation in the City of Dayton. Since this legislation includes changes of several sections fo(sic) the Revised Code of General Ordinances and involves a great deal of administrative coordination, it is recommended that all three ordinances be adopted simultaneously as emergency measures.

These three ordinances taken together address all of the policy directives of the City Commission ald(sic) meet with(sic) the approval of the Priority boards, the Citizens' Task Force, the Historic Architecture Committee and the City Plan Board. The most significant features are listed below:

THE LANDMARK COMMISSION

1. Replaces the Historic Architecture Committee and is established as full fledged City Commission Agency along with the City Plan Board, Board of Zoning Appeals and the Human Relations Council.

2. In addition to its previous duties as a quasi-judicial body, the Landmark Commission shall be responsible for promotion of historic preservation, be entitled to legal representation and act as trustees for the Landmark Trust.

3. A Landmark Trust is established to receive contributions, grants and other assets for the promotion of historic preservation.

HISTORIC DISTRICTS

1. The establishment of new historic districts or changes in type of district will require the petition of a majority of property owners.

2. The boundaries of each historic district must conform to those of the National Register.

3. There shall be two types of historic districts:

   A. Landmark Areas containing significant structures where renovation activities are significant. In these districts, major and minor alterations require approval. (See Section 150.244(A)).

   B. Preservation Areas containing primarily contributing structures with little renovation. In these districts, only major alterations require approval. (See Section 150.244(B)).

4. The Architectural Design Standards shall be those of the United States Secretary of the Interiors. Any local variations requires the approval of the City Plan Board. The architectural design standards are waived for any non-qualifying structure (any structure less than 50 years old and any older structure with no features of historic or architectural significance).

5. All structures will be classified by the Montgomery County Historical Society eliminating disagreements at the time of alterations.

6. The conditions for demolition have been clarified making it more difficult to remove without reason a landmark structure and easier to remove less important structures such as garages. Further, it will require a reuse plan consistent with the historic nature of the neighborhood and impose stiff penalties for violating the permit process.

7. Procedural changes in the ordinance will expedite certificates of appropriateness permits for improvements.

8. Procedural changes in the ordinance will require a majority vote of the Landmark Commission to deny and(sic) applicant's request. This will give the applicant the benefit of the doubt on a split decision.

9. Procedural changes in the ordinance will require the Board of Zoning Appeals to use the historic district standards in considering an appeal from the Landmark Commission and will give neighborhood groups the right to appeal.

10. The ordinance contains a set of definitions of terms in Section 150.2599 so as to eliminate arguments of language.

DEMOLITON OF LANDMARKS

National Landmarks outside of historic districts may not be demolished without review of the Landmark Commission and a determination that the cost of rehabilitation will exceed the market value of other similarly improved structures in the planning district. No other architectural standards would be imposed.

The above listing is not exhaustive of all the changes. In summary, the new legislation is substantially different in scope and purpose from the current legislation. It shifts the emphasis from preservation of all historic structures to preservation of the architectural integrity of the neighborhood. It differentiates between historically significant structures and those that are merely contributing. And finally, it envisions and(sic) active City role in the promotion and rehabilitation of historic districts rather than a limited enforcement objections.

ss/s Paul R. Woodie
Secretary to the City Plan Board

By.....

No.....

AN ORDINANCE

Supplementing the Revised Code of General Ordinances by the Enactment of Sections 44.50 to 44.57, Inclusive, to Establish the Landmark Commission and the Landmark Trust Account, and Declaring an Emergency.

WHEREAS, the public interest calls for the preservation and protection of significant architectural and archeological resources from Dayton's and America's histories that lie within our City; and

WHEREAS, the City Commission finds that the membership as well as the powers and duties of the existing Historic Architecture Committee need to be redefined by establishing a more effective instrument for the execution of public policy objectives; and

WHEREAS, the City Commission finds that promotion of historic preservation can be better served through the establishment of an account that may receive income, contributions, grants and other tangible and intangible assets; and

WHEREAS, the City Plan Board has recommended the following legislation to meet the City Commission's policy goals and objectives; and

WHEREAS, in order to permit the Landmark Commission to perform its duties and responsibilities in a timely manner it is necessary for the immediate preservation of the public

peace, health and safety that this ordinance take effect at an early date; now, therefore.

BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF DAYTON:

Section I. That Sections 44.50 through 44.57 of the Revised Code of General Ordinances be and they hereby are, enacted to read as follows:

SECTION 44.50 LANDMARK COMMISSION ESTABLISHED.

The Landmark Commission is hereby established.

SECTION 44.51 MEMBERSHIP OF THE LANDMARK COMMISSION.

The Landmark Commission shall consist of nine qualified members to be appointed by the City Commission. Two members shall be registered architects, three members shall be residents of a historic district, and one member shall represent the Montgomery County Historical Society. In addition, all members shall be City residents or have their principal place of business located in the City, and shall have demonstrated a positive interest in Historic Preservation.

SECTION 44.52 TERMS OF OFFICE.

The terms of office of the members of the Landmark Commission shall be three years or until their successors has been appointed and qualified.

SECTION 44.53 REMOVAL AND VACANCIES.

The members of the Landmark Commission shall be subject to removal with cause by the Commission after a public hearing. Any vacancy shall be filled by the City Commission for the unexpired term. Three consecutive unexcused absences, or failure to attend a majority of meetings in a twelve-month period, or loss of original qualifications, shall constitute resignation.

SECTION 44.45 ORGANIZATION AND RULES

The Landmark commission shall annually elect a Chair and Vice Chair. Meetings shall be set at such time and place as the Landmark Commission shall determine. A majority of the appointed members shall constitute a quorum. The Landmark Commission shall adopt such rules of procedure as are deemed necessary by a majority of the Landmark Commission.

SECTION 44.56 POWERS AND DUTIES

(A) The Landmark Commission shall review and act upon all modifications to and structure, site, or area listed on the National Register of Historic Places whenever said modifications involve the use of funds entrusted to the City, the use of the City's eminent domain or urban renewal powers, or the use of the City's tax abatement authority.

(B) The Landmark Commission shall classify all structures and sites listed as eligible for or on the National register of Historic Places outside of Historic Districts in accordance with Section 150.245, and shall act upon all demolition permits for said structures or sites in accordance with Section 150.246 of the Revised Code of General Ordinances.

(C) In addition to the powers and duties set forth above and in the zoning code, The Landmark Commission shall:

(1) Recommended to the City Plan Board legislation and programs designed to encourage and promote Historic Preservation and Historic District Revitalization;

(2) Prepare an annual report on its performance and plans;

(3) Be entitled to legal representation whenever its decisions are appealed to the Board of Zoning Appeals or a court of law;

(4) Prepare an annual budget for the Landmark Trust Account; and

(5) Perform such other duties as may be requested by the City Commission.

SECTION 44.57 LANDMARK TRUST ACCOUNT.

(A) The Landmark Trust Account is established to promote Historic Preservation through public education and distribution of guidelines and standards, training, architectural assistance and other preservation activities consistent with the purposes set forth in the Historic District Ordinance.

(B) Expenditures shall be authorized in a manner

prescribed for all City upon signature of the Director of Planning. However, no expenditure shall be made without the approval of the Landmark Commission.

(B) Upon approval of the City Commission, the trust may

receive income, contributions, grants, and other tangible and intangible assets. In addition, all performance bonds and mitigation fees as set forth in the historic district portion of the zoning code shall be entrusted to and deposited in the Landmark Trust Account.

Section II. For the reasons stated in the preamble hereof, this ordinance is declared an emergency measure and shall take effect immediately upon its passage.

Passed by the City Commission _____, 1988

Signed by the Mayor _____, 1988

_____

Mayor of the City of Dayton, Ohio

ATTEST:

_____

Clerk of the Commission

Approved as to form:

_____

City Attorney

By .....
No.....

AN ORDINANCE

Supplementing the Revised Code of General Ordinance by the Enactment of Section 150.45 to Require a Review by the Landmark Commission Prior to the Issuance of a Demolition Permit for any Structure or Site Listed On or Eligible for the National Register of Historic Places, and Declaring and Emergency.

WHEREAS, the public interest calls for the preservation and protection of significant architectural and archeological resources from Dayton's and America's histories that lie within our City; and

WHEREAS, the City Commission desires to insure that the demolition of structures and sites listed on or eligible for the National Register of Historic Places is carefully considered prior to the issuance of a demolition permit by the City; and

WHEREAS, the City Plan Board and the Landmark Commission have recommended an amendment to the text of the Zoning Ordinance in order to meet the aforementioned public policy objectives; and

WHEREAS, there is an eminent threat to the preservation of significant historic structures and therefor it is necessary for the immediate preservation of the public peace, property, health and safety that this ordinance take effect at an early date; now, therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON:

Section I. That Section 150.45 of the Revised Code of General ordinance be, and it hereby is enacted to read as follows:

SECTION 150.45 NATIONAL REGISTER STRUCTURES AND SITES.

Whenever an application is made for a demolition permit for any structure or site listed on or eligible for the National Register of Historic Places, no demolition permit shall be issued until the applicant has complied with the provisions of Section 150.246 of the R.C.G.O. irrespective of any other provisions of this subchapter.

Section II. For reasons stated in the preamble hereof, this ordinance is declared an emergency measure and shall take effect immediately upon its passage.

Passage by the City Commission ____, 1988

Signed by the Mayor _____, 1988

_____
Mayor of the City of Dayton, Ohio

ATTEST:

_____
Clerk of the Commission

Approved as to form:

_____

City Attorney

By.....

No.....

AN ORDINANCE

Amending Sections 150.230 to 150.2599, Inclusive, of the Revised Code of General Ordinances Relating to the Standards for Historic Districts, and Declaring an Emergency.

WHEREAS, the public interest calls for the preservation and protection of significant architectural and archeological resources from Dayton's and America's histories that lie within our City; and

WHEREAS, the City Commission finds that the existing legislation governing the standards for historic districts needs to be revised; and

WHEREAS, the City Plan Board and the Historic Architecture Committee have recommended amendments to the text of the Zoning Ordinance in order to meet the City Commission's policy goals and objectives; and

WHEREAS, it is necessary to enact several pieces of legislation in a timely manner, to protect significant public and private investment in the City's historic neighborhoods, insure consistent public policy and zoning regulations, and the immediate preservation of the public peace, property, health, and safety that this ordinance take effect at an early date; now, therefore.

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON:

SECTION 1. That Sections 150.230 to 150.2599 inclusive of the Revised Code of General Ordinances be, and they hereby are, amended to read as follows:

SECTION 150.230 PREAMBLE

The public interest calls for the preservation and protection of significant architectural and archeological resources from Dayton's and America's histories that lie within our city. Buildings and places which tell us of the presence of our forebearers add meaning and liveability to a city as do handsome residential areas and orderly business districts. To accomplish this it is necessary to provide a method whereby, with careful consideration for the rights of private property and only after thorough analysis of the objectives to be achieved, certain public controls are required for changes made to meaningful buildings or neighborhoods.

SECION 150.231 PURPOSE

(A) It is the intent of this subchapter to promote and protect the health, safety and general welfare of the public through:

(1) The enhancement of property values, economic development, neighborhood stability and the protection of property rights of all citizens;

(2) The preservation and enhancement of a city of varied
architectural styles reflecting the distinct phases of the City's history;

(3) The preservation, restoration or rehabilitation of historically significant districts, sites, buildings, structures

and objects that possess integrity of location, design, setting, materials, workmanship, feeling and association; and

(4) The development and maintenance of appropriate settings and environment for the aforesaid sites and areas.

(B) To this end, this section authorizes the adoption of overlay historic districts to review and approve architectural modifications which affect the historic quality of such districts and sites.

SECTION 150.232 DESIGNATION OF OVERLAY DISTRICT

(A) The Landmark Commission shall recommend to the City Plan Board the adoption or modification of a historic district overlay on all eligible areas. The boundaries of each such district shall be indicated on the official zoning map pursuant to Sections 150.51 and 150.52.

(B) Areas previously designated HD-T on the official zoning
map are hereby designated HD-1, except that portion on the HD-T named Oregon which will be designated HD-2, and areas previously designated HD-A and HD-L are hereby designated HD-2 notwithstanding the provisions of Sections 150.233 through 150.240.

HD-1 PRESERVATION OVERLAY

SECTION 150.233 PURPOSE

The HD-1 Historic Overlay is an overlay district designed to preserve and protect groups of structures, sites,

or areas eligible for or listed on the National Register of Historic Places in which the district consists of a large number of non-qualifying structures, undeveloped parcels, or contributing structures that have not undergone rehabilitation, and/or the planning district as a whole consists of a large number of non-qualifying structures which dominate the vista.

SECTION 150.234 NOMINATION

Any area eligible under Section 150.233 may be nominated by a petition signed by owners representing a majority of the parcels in the proposed area. The petition shall contain the signatures of at least one property owner for each non-exempt taxable parcel and at least one citizen for each tax exempt parcel as listed on the County Auditor's records. The petition shall be in a form prescribed by the Landmark Commission and filed with the Clerk of the City Commission. Upon receipt from the clerk, the Landmark Commission shall determine the validity of the petition and eligibility of the proposed area. If the area is eligible and the petition is valid, the Landmark Commission may propose an amendment to the official zoning map for all or part of the original proposed area in accordance with Section 150.235. Thereafter, the overlay district may be determined in the manner set forth in Sections 150.51 and 150.52.

SECTION 150.235 BOUNDARIES

In determining the boundaries of HD-1 Historic Overlay, the following guidelines shall be controlling to ensure vista control and to protect the integrity of the proposed district:

(A) The area must be eligible for or listed on the

National Register of Historic Places.

(B) The overlay district must consist of the entire underlying zoning district or at least 10 contiguous streetscapes. In no instance, shall the overlay district be less than four (4) block faces.

(C) Complete streetscapes or block faces may be included in the district so long as a portion of the streetscape is on or eligible for the National Register of Historic Places.

(D) A structure, site or area which is not eligible for or listed on the National Register may be included in the district if it is effectively enveloped by an eligible highway, river or bridge.

SECTION 150.236 ACTIVITIES GOVERNED

Any major modification as set forth in section 150.244(A) shall require a Certificate of Appropriateness.

HD-2 LANDMARK OVERLAY

SECTION 150.237 PURPOSE

The HD-2 Historic District is an overlay district designed to preserve and protect single parcels or groups of structures, sites or areas eligible for or on the National Register of Historic Places, in which the district as a whole consists primarily of historically or architecturally significant structures, sites or areas and/or contributing structures which have undergone rehabilitation or restoration.

SECTION 150.238 NOMINATION

Any area eligible under Section 150.237 may be nominated by a petition signed by owners representing a majority of the parcels in the proposed area. The petition shall contain the signature of at least one property owner for each non-exempt taxable parcel and at least one citizen for each tax exempt parcel as listed on the County Auditor's records. The petition shall be in form prescribed by the Landmark Commission and filed with the Clerk of the City Commission. Upon receipt from the clerk, the Landmark Commission shall determine the validity of the petition and eligibility of the proposed area. If the area is eligible and the petition is valid, the Landmark Commission may propose an amendment to the official zoning map for all or part of the original proposed area in accordance with Section 150.239. Thereafter, the overlay district may be designated in the manner set forth in Section 150.51 and 150.52.

SECTION 150.239 BOUNDARIES

In determining the boundaries of a HD-2 Historic overlay, the following guidelines shall be controlling to ensure vista control and to protect the integrity of the proposed district:

(A) The area must be eligible for or listed on the National Register of Historic Places.

(B) Complete streetscapes or block faces may be included in the district so long as a portion of the streetscape includes historically or architecturally significant structures, sites or areas and/or contributing structures which have undergone rehabilitation or restoration.

(C) A structure, site or area which does not otherwise qualify may be included in the district if it is effectively enveloped by an eligible area under Section 150.237 and by a topographical barrier such as an elevated highway, river or bridge.

SECTION 150.240 ACTIVITIES GOVERNED

Any modifications as set forth in Section 150.244 shall require a Certificate of Appropriateness.

SECTION 150.241 DUTIES OF THE LANDMARK COMMISSION

The Landmark Commission shall recommend designation of a particular historic district by adoption of controls on particular parcels through amendments to the official zoning map, shall review and act upon all applications for Certificates of Appropriateness for modifications not specifically assigned to the Secretary, and shall hear appeals from the decisions of the Secretary for all other modifications.

SECTION 150.242 DUTIES OF SECRETARY

The Planning Director or his designee shall act as Secretary to the Landmark Commission and shall maintain records and minutes of all proceedings, shall approve, modify or disapprove minor architectural modifications and those major modifications specifically assigned to the Secretary by resolution of the Landmark Commission, and perform such other duties provided by this subchapter or required by the Landmark Commission.

SECTION 150.243 ACHITECTURAL DESIGN STANDARDS.

(A) Architectural design standards and landscaping controls preserve or protect the design or structural integrity of structures or groups of structures, or protect views to such structures. These standards and controls are appropriate additions to regulations of historic districts. Such controls shall supersede design controls pertaining to underlying zoning districts.

(B) To insure the equitable application of these controls,
The Standards of the United States Secretary of the Interior will govern the decisions of the Landmark Commission and its Secretary in the issuance of Certificates of Appropriateness. However, the City Plan Board upon recommendation of the Landmark Commission may adopt supplemental guidelines which interpret and clarify these standards.

(C) Changes to interior spaces of significant structures which are open to the public and possess historic or architectural features shall be consistent with the Architectural Design Standards herein set forth.

(D) Since removal of any structure or site listed eligible for or on the National Register of Historic Places may be an irreparable act contrary to the public good as set forth in Sections 150.230 and 150.231, no demolition permit shall be issued for any structure or site so listed anywhere in the City unless accompanied by an approved Certificate of Appropriateness in accordance with the provisions of Section 150.246 of this subchapter.

(E) The Landmark Commission may waive the

Architectural Design Standards on non-qualifying structures or structures which are inconsistent with the architectural or historic integrity of the district so long as the proposed alteration will not adversely affect the overall architectural integrity of the district.

SECTION 150.244 CLASS OF ARCHITECTURAL MODIFICATIONS

(A) Major modifications governed by the Architectural Design Standards include any exterior alterations requiring a City permit or any of the following activities:

(1) construction or removal of a building, addition, accessory, structure, porch, deck or patio;

(2) Construction or removal or (sic) decorative details such as chimneys, latticework, gables, gingerbread, soffits and shutters;

(3) Construction or removal of door and window openings and replacement of windows;

(4) Major repairs of exterior surfaces such as abrasive cleaning, siding or painting or (sic) unpainted surfaces;

(5) Fencing and signage; and

(6) Changes to interior spaces of significant structures which are open to the public.

(B) Minor modifications include the following alterations governed by the Architectural Design Standards:

(1) Repainting of existing painted surfaces;

(2) Replacement of doors, roof, gutters and downspouts;

(3) Repair of decorative detail;

(4) Minor repair of exterior surfaces such as caulking, masonry repointing and non-abrasive cleaning; and

(5) Landscaping such as major regarding, trees, shrubs and outdoor lighting.

SECTION 150.245 CLASS OF STRUCTURES

All structures and sites within a historic district shall be classified by the Landmark Commission as significant, non-qualifying or contributing.

SECTION 150.246 CONDITIONS OF REMOVAL

A demolition permit shall not be issued unless accompanied by an approved Certificate of appropriateness. The Landmark Commission may only approve a certificate of Appropriateness if:

(A) The applicant has given clear evidence that one of the following conditions exist:

(1) The structure has incurred extensive damage to its basic structural elements such as the roof, walls and foundation requiring substantial reconstruction and presenting an immediate danger to the public safety as declared by the Chief Building Official.

(2) The structure is contributing and has been declared a public nuisance under Section 152.01 and its removal will not adversely affect the architectural or historic integrity of the streetscape.

(3) The structure is listed as non-qualifying or is not consistent with other structures in the district in terms of historic character, architectural style, construction material, height, setback or mass.

(4) The square foot cost of meeting the minimum building code would exceed the square foot market value of similarly used and improved structures in the planning district.

(B) The applicant has submitted a Reuse Plan which mitigates any adverse effects of the proposed removal upon the property, the streetscape and the district throughout:

(1) New construction which is consistent with the Architectural Design Standards and which contributes to the architectural or historic integrity of the district.

(2) Exterior rehabilitation or restoration of the remaining structure which is consistent with the Architectural Design Standards and which contributed to the architectural or historic integrity of the streetscape.

(3) Landscaping the parcel consistent with the Architectural Design Standards and relocating the remaining structure in an appropriate setting or preserving of the salvageable architectural materials.

(4) Landscaping the parcel consistent with the Architectural Design Standards and providing for its care as common space for the benefit of the general public.

(5) If no alternatives or mitigation is possible and the undertaking's benefits in relation to the significance of the property justify demolition as an acceptable loss, the Landmark Commission may consider other appropriate Reuse Plans.

(C) The applicant has posted a performance bond with the Secretary sufficient to insure completion of the Reuse Plan and has paid a mitigation fee of $50 or 10% of the estimated demolition cost, whichever is greater into the Landmark Trust, or the applicant has requested and received a waiver of these requirements from the Landmark Commission.

(D) If any party proceeds to remove a significant principal structure prior to the issuance of an approved Certificate of Appropriateness, a mitigation fee equal to 10% of the estimated demolition cost as determined by the Chief Building Official shall be levied for each day after notification of said violation until said party files a Reuse Plan and a performance bond with the Secretary.

SECTIONS 150.247 AREA AND BULK REGULATIONS

The lot area and bulk regulations shall be those of the underlying zoning district except as follows:

(A) Structure height. The height of a new principal structure shall not vary more than ten percent (10%) from the average height of the existing significant and contributing principal structures on the streetscape.

(B) Front yard. The minimum required front yard shall be within five feet, more or less, of the average existing front yard setback on the block face on which the structure is located.

(C) Side yard on corner lot. The side yard on the street side of a corner lot shall be within five feet, more or less, of the average existing front yard setback of the block face on which the side yard is required.

(D) Maximum lot coverage. The maximum lot coverage shall be the same as the underlying zoning district, or 3000 square feet so long as it meets the other provisions of this section.

(E) Accessory building setbacks. There shall be no minimum required setback from the rear lot line for accessory structures, except as may be required to provide reasonable access thereto, pursuant to Section 150.350(B).

(F) Creation of small lots. The creation of lots smaller than 5,000 square feet may be permitted by the City Plan Board for existing buildings and construction of new buildings provided the newly created lot and the proposed structure is in scale with the average lot size and structures of the block on which it is located.

(G) Satellite earth stations or dish antennas. Satellite earth stations or dish antennas shall only be permitted as an accessory structure in accordance with requirements in Section 150.333 and 150.336, provided it is located and screened to minimize visual impact on the historic district from the street and adjacent properties.

SECTION 150.248 USES

The permitted and conditional uses shall be those permitted uses of the underlying zoning district except that the following additional conditional uses may be allowed in structures which were specifically designed and arranged, in part or in whole, for commercial use when originally constructed, but only after having complied with the requirements and approval procedures specified in Section 150.453 and 150.460.

(A) Antiques – Retail Sales

(B) Art – Retail Sales

(C) Artist, Sculptor, Designer Studios and Galleries

(D) Books – Retail Sales

(E) Dressmaking, Seamstress, and Tailor shops

(F) Florists

(G) Grocery, Meat, and Fish – Retail Sales

(H) Jewelry – Retail Sales

(I) Offices

(J) Photo Studios

(K) Watch, Clock and Jewelry Repair

SECTION 150.249 SIGNS

(A) The sign regulations of the underlying zoning

districts shall apply to a historic district. The following additional regulations shall apply to signs located within a Historic District.

(1) Billboards and portable signs are prohibited.

(2) Moving and flashing signs are prohibited.

(3) Signs extending above the wall of any structure to which they are attached are prohibited.

(4) Advertising signs are prohibited.

(5) (Identification) signs in scale with the building on which they are located are permitted, however, they shall not exceed 100 square feet in sign area. Projecting signs may not exceed 32 square feet, or 16 square feet per use. No more than two (2) signs per use are permitted.

(6) Sign illumination and exterior lighting are permitted. Internally lit plastic signs are prohibited. The lighting of signs shall be consistent with the general architectural standards of a historic district.

(7) All free standing and ground projecting signs shall be prohibited except for traffic-control and historic district identification signs.

(8) Short term or temporary signs are permitted and no Certificate of Appropriateness is required, provided, they are only displayed for a maximum of 7 consecutive days, have a maximum size of 20 inches by 30 inches and only one such sign may be displayed.

B) Signs shall be considered exterior modifications of the structure on which they are located and shall be subject to the review of the Landmark Commission.

SECTION 150.250 OFF-STREET PARKING AND LOADING

(A) For permitted uses within the boundaries of a Historic District, off-street parking and loading requirements shall be those set forth in Sections 150.344 through 150.353.

(B) However, off-street and off-site parking spaces shall be considered modifications to the property on which they are located, potentially affecting the view of the streetscape and shall be subject to the review of the Landmark Commission.

SECTION 150.251 CERTIFICATE OF APPROPRIATENESS

(A) In addition to other permits required by this chapter, a Certificate of Appropriateness assuring compliance with these additional standards is required prior to the beginning of any construction, demolition, exterior redesign, or maintenance of exterior surfaces in any historic district.

(B) A Certificate of appropriateness shall remain valid for a period of twelve months from the date of issuance. If such work is delayed for a period exceeding twelve months the Certificate of appropriateness shall automatically expire and any other zoning or building permits issued in conjunction with it shall become void.

(C) The Secretary may grant, but not exceed, two

extensions of the period of validity of a Certificate of Appropriateness, not to exceed six months each. A request for an extension shall set forth the reasons for the delay

(D) Applications for a zoning certificate in a historic
district shall also be considered an application for a Certificate of Appropriateness and be submitted to the Zoning Administrator. Such applications shall contain information which will enable determination of compliance with the rehabilitation standards and land use controls set forth in this subchapter.

SECTION 150.252 REVIEW BY ZONING ADMINISTRATOR

The Zoning Administrator shall first review each application for compliance with all requirements of this subchapter except those items enumerated in Section 150.243. If the application is found to be in compliance, the Zoning Administrator shall immediately refer two copies of the application and all attached materials to the Secretary of the Landmark Commission, accompanied by a written statement signed by the Zoning Administrator stating that, "This application has been reviewed for compliance with all requirements of the zoning code except for the additional design standards imposed by the historic district regulations and has been found to comply with same."

SECTION 150.253 REVIEW BY SECRETARY

(A) The Secretary of the Landmark Commission shall review the application for conformance with the standards enumerated in Section 150.243 and shall approve, modify, or disapprove those items listed as minor

modifications and those major modifications specifically assigned by the Landmark Commission.

(B) If review by the Landmark Commission is not required, a Certificate of Appropriateness shall be issued or denied by the Secretary and the applicant shall be notified of such action in writing within seven days.

(C) If review by the Landmark Commission is required, the Secretary shall schedule the application for review by the Landmark Commission at the earliest possible date.

SECTION 150.254 APPEAL OF SECRETARY'S DECISION

If the application is denied, or approved subject to modifications by the Secretary, the applicant may request review by the Landmark Commission. Such reviews shall be requested in writing to the Landmark Commission within 14 days of the decision by the Secretary.

SECTION 150.255 REVIEW BY LANDMARK COMMISSION

(A) The Landmark Commission shall review all applications for major modifications not specifically assigned to the Secretary, and any appeal from a decision of the Secretary.

(B) The Landmark Commissions' review shall be by hearing. The Secretary of the Landmark Commission shall notify the applicant of the time and place of the hearing not less than seven days before the date of the hearing, and notice of the hearing shall be posted in the office of the

Department of Planning for public view. No other notice shall be required. The hearing shall be held within 30 days after the date of receipt of application by the Secretary.

(C) The Landmark Commission shall render its decision in writing approving the application, denying the application, or approving it subject to modifications, but no application shall be denied or modified unless a majority of the then appointed members of the Landmark Commission agree to deny or modify the application.

(D) The Secretary shall notify the Zoning Administrator in writing within seven days of the action of the Landmark Commission and issue a Certificate of Appropriateness if the review by the Secretary or the action of the Landmark Commission resulted in approval of the application.

(E) The Landmark Commission shall not be required to hear any application which substantively covers a matter on which it has ruled within the preceding six (6) months.

SECTION 150.256 APPEAL OF LANDMARK COMMISSION DECISION

If the application is denied by the Landmark Commission, the applicant or any interested party or (sic) record may request a hearing before the Board of Zoning Appeals within 14 days following the date of the decision in the manner provided for in Section 150.349 through 150.442 of this chapter. Using only the standards set forth in this chapter, the Board of Zoning Appeals may affirm, reverse or remand, in whole or in part, the decision of the Landmark Commission, except that a decision to reverse

shall require the concurrence of a majority of the appointed members and shall be based on one of the following findings: -

(A) That the Landmark Commission erred in its application of the architectural design standards, or

(B) That the Landmark Commission committed procedural error which substantively affected the rights of the applicant or the rights of any interested party of record to a Certificate of appropriateness.

SECTION 150.2599 DEFINITIONS

AREA: A group of parcels or public spaces.

BLOCK FACE: A single side of a dedicated street running from street to street including parcels and public right-of way.

CONTRIBUTING: A property, structure or site within a historic district which supports the historical and architectural context of the area's association to broad patterns of our history or any property, structure, or site which is not otherwise classified as significant or non-qualifying.

DISTRICT: A geographically definable area possessing

a significant concentration, linkage, or continuity of sites, buildings, structures, and/or objects united by past events or aesthetically by plan or physical development.

NATIONAL REGISTER ELIGIBLE: A property that meets all the criteria for listing in the National Register of Historic Places and is listed as eligible on the Ohio Historic Inventory.

NATIONAL REGISTER STRUCTURE OR DISTRICT: A property or area that has been added to the official list of properties significant in American history, architecture, archeology, engineering or culture for use in local preservation planning efforts.

NON-QUALIFYING: A property, structure or site that does not contribute to the significance of the district. Principal or accessory structures which are characterized as intrusions and

do not meet the criteria for listing in the

National Register of Historic Places.

REHABILITATION: To restore to a condition for constructive

activity in keeping with the style of architecture of the structure.

SIGNIFICANT: A property, structure or site that is associated with events that have made

a significant contribution to the broad

patterns of our history. Principal or accessory structure with unique historic

or architectural features.

STREETSCAPE: Adjacent block faces which face each

other.

STRUCTURE: A work made up of interdependent and

interrelated parts in a definite pattern or

organization, generally constructed by

man. The building or portion of the building, or a detached accessory building

such as a porch, garage, deck, or wall on

a single property.

SECTION II. That Sections 150.230 to 150.259 inclusive are heretofore enacted by this Commission be, and the same hereby are repealed.

SECTION III. For reasons stated in the preamble hereof, this ordinance is declared an emergency measure and shall take effect immediately upon its passage.

Passed by the City Commission _____, 1988

Signed by the Mayor _____, 1988

_____
Mayor of the City of Dayton, Ohio

ATTEST:

_____
Clerk of the Commission

Approved as to form:

_____
City Attorney

HISTORICAL DISTRICTS

§ 150.230 PREAMBLE.

The public interest calls for the preservation and protection of significant architectural resources from Dayton's and America's histories that lie within our city. Buildings and places which tell us of the presence of our forebears add meaning and liveability to a city as do handsome residential areas and orderly business districts. To accomplish this it is necessary to provide a method whereby, with careful consideration for the rights of private property and only after thorough analysis of the objectives to be made to meaningful buildings or neighborhoods.
(Ord. 26212, passed 4-8-81)

§ 150.231 PURPOSE.

(A) It is the intent of this subchapter to promote and protect the health, safety, and general welfare of the public through:

(1) The enhancement of property values, the protection of property rights of all citizens, and the stabilization of neighborhoods and areas of the city.

(2) The increase in economic and financial benefits to the city and its inhabitants, and the promotion of tourist trade.

(3) The protection, enhancement, perpetuation and use of structures, sites, and areas that are reminders of past eras, events, and persons important in local, state, or national history or which provide for this and

future generations as examples of the physical surroundings in which past generations lived.

(4) The development and maintenance of appropriate settings and environments for the aforesaid structures, sites, and areas.

(5) The preservation and encouragement of a city of varied architectural styles, reflecting the distinct phases of the city's history.

(B) To this end, this section authorizes the adoption of overlay historic districts and a Historic Landmark Resource District and creates a Historic Architecture Committee hereafter generally referred to as the Committee to review rehabilitation proposals which affect architectural design in such districts.
(Ord. 26212, passed 4-8-81)

§ 150.232 DESIGNATION OF DISTRICTS.

The Historic Architecture Committee may recommend the adoption of a historic district on any parcels of land containing structures or groupings of structures for which a special historic, architectural, or aesthetic interest or value to the general public can be substantiated. No such district shall be designated except as shall first be recommended by the Historic Architecture Committee and thereafter enacted into ordinance in the manner required for amendments to this chapter. A copy of the ordinance creating each historic district shall be on file with the Zoning Administrator. The boundaries of each such district shall be indicated on the official zoning map pursuant to §§ 150.51 and 150.52.
(Ord. 26212, passed 4-8-81)

§ 150.233 USE, AREA, AND BULK REGULATIONS.

The use, lot area, and bulk regulations of a particular historic district shall be those of the underlying zoning district in which an historic district shall be hereafter established, except as the use, areas, bulk, and yard regulations shall be expressly modified or revised by the ordinance creating the historic district.
(Ord. 26212, passed 4-8-81)

§ 150.234 ARCHITECTURAL DESIGN STANDARDS.

(A) Architectural design standards and landscaping controls preserve or protect the design or structural integrity of structures or groups of structures, or protect views to such structures. These standards and controls are appropriate additions to regulations for historic districts. Such controls shall include but are not limited to:

(1) Dimensional relationships of structures.

(2) Building materials and types.

(3) Ornamentation materials.

(4) Paving, landscaping, and materials.

(5) Building location.

(6) Exterior colors.

(7) Interior arrangements. Such controls shall

supercede (sic) design controls pertaining to underlying zoning districts.

(B) To insure equitable application of standards between all projects in the city, the following standards will be applied to all applications for certificates of appropriateness:

(1) Every reasonable effort shall be made to provide a compatible use for a property which requires minimal alteration of the building, structure, or site and its environment, or to use a property for its originally intended purpose.

(2) The distinguishing original qualities or character of a building, structure, or site and its environment shall not be destroyed. The removal or alteration of any historic material or distinctive architectural features should be avoided when possible.

(3) All buildings, structures, and sites shall be recognized as products of their own time. Alterations that have no historical basis and which seek to create an earlier appearance shall be discouraged.

(4) Changes which may have taken place in the course of time are evidence of the history and development of a building, structure, or site and its environment. These changes may have acquired significance in their own right, and this significance shall be recognized and respected.

(5) Distinctive stylistic features or examples of skilled craftsmanship which characterize a building, structure, or site shall be treated with sensitivity.

(6) Deteriorated architectural features shall be repaired rather than replaced, wherever possible. In the event replacement is necessary, the new material should match the material being replaced in composition, design, color, texture, and other visual qualities. Repair or replacement of missing architectural features should be based on accurate duplications of features, substantiated by historic, physical, or pictorial evidence rather than on conjectural designs or the availability of different architectural elements from other buildings or structures.

(7) The surface cleaning of structures shall be undertaken with the gentlest means possible. Sandblasting and other cleaning methods that will damage the historic building materials shall not be undertaken.

(8) Every reasonable effort shall be made to protect and preserve archeological resources affected by, or adjacent to any project.

(9) Contemporary design for alterations and additions to existing properties shall not be discouraged when such alterations and additions do not destroy significant historical, architectural or cultural material, and such design is compatible with the size, scale, color, material, and character of the property, neighborhood or environment.

(9) Wherever possible, new additions or alterations to structures shall be done in such a manner that if such additions or alterations were to be removed in the future, the essential form and integrity of the structure would be unimpaired.

(Ord. 26212, passed 4-8-81)

§ 150.235 HISTORIC ARCHITECTURE COMMITTEE.

The Historic Architecture Committee is created and shall consist of nine members to be appointed by the City Commission. Seven members shall be residents of the City. Two members shall be registered architects, one member a practicing attorney, two members shall be residents of an historic district, and one member shall represent the Montgomery County Historical Society. Each member shall serve a term of three years or until their successor has been duly appointed and qualified, except that four shall be appointed with terms expiring on June 30, 1989. The Committee shall annually elect a Chairperson and a Vice-Chairperson. Vacancies shall be filled for the unexpired term of a member whose place has become vacant, in the manner herein provided for the appointment of such member. Three consecutive unexcused absences, or failure to attend a majority of meetings in a twelve-month period, or loss of qualification, shall constitute resignation. Meetings shall be at such time as the committee may determine. Five members present at a meeting shall constitute a quorum. The City Commission shall have the power to remove any member for cause after a public hearing.
(Ord. 26212, passed 4-8-81;amend. Ord. 27462, passed 10-8-86)

§ 150.236 DUTIES OF COMMITTEE.

The Committee shall recommend enactment of specific historic district controls, shall recommend designation of particular historic districts by adoption of such controls on particular parcels or groups of parcels through amendments to the official zoning map, and shall publish general guidelines for the review of applications in

each particular district so designated. Also, the Committee shall review and act on all applications for certificates of appropriateness for major rehabilitation as defined by § 150.237 and shall hear appeals from the decision of the secretary for minor rehabilitation as defined by section § 150.238, in accordance with standards set forth in § 150.234.
(Ord. 26212, passed 4-8-81)

§ 150.2361 DUTIES OF SECRETARY.

The Planning Director shall appoint a secretary to the Committee who shall maintain records and minutes of all proceedings and shall approve those minor rehabilitation activities defined in § 150.237 where it is found that the application for such activities meets the rehabilitation standards set forth in § 150.234 of this subchapter.

(Ord. 26212, passed 4-8-81)

§ 150.237 REHABILITATION ACTIVITIES.

Rehabilitation activities shall be classified as one of two types, either minor or major.

(A) Minor rehabilitation activities include the following:

(1) Painting.

(2) Minor structural repairs. Masonry, repainting, or cleaning, window or door removal, replacement or addition of window, doors, roof, gutters, or downspouts.

(3) Emergency repairs. Conditions which could serve as potential threats to the public health, safety, or welfare.

(4) Architectural features. Additional replacement, removal of latticework, shutters, gingerbread, or similar details.

(5) Landscaping. fence, signs, outdoor lighting, trees and shrubs.

(B) Major rehabilitation activities include the following:

(1) Construction. A building, addition, accessory structure, parking pad or lot, porch, deck, or patio.

(4) Change. Of significant architectural features, addition or removal of those features which help to define the architectural style of the structure.

(5) Demolition. Any principal or accessory structure, addition, porch, deck, or patio.
(Ord. 26212, passed 4-8-81)

§ 150.238 CERTIFICATE OF APPROPRIATENESS REQUIRED.

(A) In addition to other permits required by this subchapter, a certificate of appropriateness assuring compliance with the additional standards is required prior to the beginning of any construction, demolition, exterior redesign, or maintenance of exterior surfaces in any historic district including, but not limited to:

(1) New construction of primary or accessory structures, fences, walls, patios, drives, and walks, whether permanent or temporary;

(2) Additions to, or removal of, all or any part of an existing structure;

(3) Rehabilitation, painting, resurfacing, or replacement of exterior surfaces including, but not limited to foundations, walls, roofs, siding, gutters, downspouts, doors, windows, trim, and decorative features;

(4) Regrading and decorative landscaping other than grass;

(5) Interior and exterior signs, whether permanent or temporary, including signs which are placed on the interior of a window or within 2 feet of a window, except as modified by §§ 150.249(A)(8), 150.254(A)(7), and 150.259(A)(8).

(B) The certificate of appropriateness shall remain valid for a period of six months from the date of issuance unless, during the period of validity, the work for which the certificate was issued is begun and proceeds with reasonable speed. If no such work is begun, or if such work is delayed for a period exceeding six months the certificate of appropriateness shall automatically expire and any other zoning or building permits issued in conjunction with it shall become void.

(C) The secretary may grant, but not exceed, two extensions of the period of validity not to exceed six months each. The request for an extension shall set forth reasons for the delay.

(D) Applications for a zoning certificate in a historic district shall also be considered an application for a certificate of appropriateness. Such applications shall contain information which will enable determination of compliance with the rehabilitation standards and land use controls set forth in §§150.234, 150.237, and 150.238.

(Ord. 26212, passed 4-8-81, amend. Ord. 27467, passed 10-22-86)

§ 150.239 REVIEW BY ZONING ADMINISTRATOR.

The Zoning Administrator shall review each application for compliance with all requirements of this subchapter except those items enumerated as in § 150.234 or those specific requirements applicable to a designated historic district. If the application is found to be in compliance, the Zoning Administrator shall immediately refer two copies of the application and all attached materials to the secretary of the Historic Architecture Committee, accompanied by a written statement signed by the Zoning Administrator stating that, "This application has been reviewed for compliance with all requirements of the zoning code except for the additional standards imposed by the historic district regulations and has been found to comply with same."
(Ord. 26212, passed 4-8-81)

§ 150.240 REVIEW BY SECRETARY.

(A) The secretary of the Historic Architecture Committee shall review the application for conformance with the standards imposed by the historic district and shall approve, approve subject to modification, or disapprove those items listed in § 150.237 (A) as minor rehabilitation activities.

(B) If the review by the Historic Architecture Committee is required, a certificate of appropriateness shall be issued or denied by the secretary and the applicant shall be notified of such action in writing.

(C) If review by the Historic Architecture Committee is required, the secretary shall schedule the application for review by the Committee at the earliest possible date.
(Ord. 26212, passed 4-8-81)

§ 150.241 APPEAL.

If the application is denied, or approved subject to modifications, by the secretary, the applicant may request review by the Historic Architecture Committee. Such review shall be requested in writing to the Committee through the secretary.
(Ord. 26212, passed 4-8-81)

§ 150.242 REVIEW BY COMMITTEE.

(A) The Historic Architecture Committee shall review all applications for major rehabilitation as defined in § 150.237 (B) and any appeal from a decision of the secretary.

(B) The Committee's review shall be by hearing. The secretary on the Committee shall notify the applicant of the time and place of a hearing on his application not less than ten days before the date of the hearing, and notice of the hearing shall be posted in the office of the Department of Planning for public view. No other notice shall be required. The hearing shall be held within 30 days after the date of receipt of application by the secretary.

(C) Within 20 days after the hearing, the Committee shall approve the application, deny the application, or approve it subject to modifications, but no application shall be denied or modified unless a majority of the Committee present votes to reject or modify the application. The Committee shall state its specific reasons for denial or modification of proposals at the time that such actions are taken.

(D) The secretary shall notify the Zoning Administrator, in writing, of the action of the Committee and issue a certificate of appropriateness if the review by the secretary and the action of the Committee resulted in approval of the application. If the application has been approved subject to modifications, or has been denied, the secretary shall list such modifications, or state the reason for denial in writing.
(Ord. 26212, passed 4-8-81)

§ 150.243 APPEAL.

If the application is denied by the Committee, the applicant may request a hearing before the Board of Zoning Appeals, within 30 days following the date of decision, in the manner provided for in §§ 150.439 through 150.444 of this chapter. The Board may reverse or affirm the decision of the Committee.
(Ord. 26212, passed 4-8-81)

§ 150.244 PUBLICATION OF GUIDELINES.

The Historic Architecture Committee shall develop guidelines for each area designated as a historic district. On approval of such guidelines by resolution of the Commission they shall be published and made available to

the general public. The guidelines shall be designed to provide direction to the property owner in a historic district in developing and accomplishing restoration and maintenance programs. The guidelines shall detail, as much as possible, those materials, styles, and techniques which will or will not be approved by the Committee or the secretary.
(Ord. 26212, passed 4-8-81)

HD-A HISTORIC DISTRICT

§ 150.245 PURPOSE.

The HD-A Historic District is an overlay district designed to preserve and protect significant groupings of structures of a variety of architectural styles which are unique in their association with, and irreplaceable value to, the city. These groupings are identified below:

(A) The Oregon Historic District shall consist of an area located southeast of downtown Dayton which is designated Oregon HD-A on the official zoning map. The area, as mapped, contains structures of architectural and historical interest which were constructed in the mid-19th century. Most of the residential and commercial structures were built using the Federal and Victorian styles. Oregon was the city's first suburb and developed as a result of the construction of the Miami-Erie Canal. It continues as the city's oldest neighborhood and reflects the successes of its past residents.

(B) Also located southeast of downtown Dayton shall be St. Anne's Hill Historic District, designated St. Anne's Hill HD-A on the official zoning map. The area contains structures of architectural and historic interest which were constructed in the mid to late-19th century.

Most of the residential and commercial structures were built using Roman Revival and Victorian styling. St. Anne's Hill was the home of many talented local artisans and craftsmen whose work is exemplified throughout the neighborhood.

(C) The McPherson Town Historic District shall consist of an area located directly north of downtown Dayton which is designated McPherson Town HD-A on the official zoning map. The area contains structures of architectural and historical interest which were constructed in the late-19th and early-20th centuries. The Town of McPherson, a fledgling farming community, was annexed by the city in 1868, spurring development on the north side of the Great Miami.

(D) Northwest of downtown Dayton and adjacent to Salem Avenue shall be the Dayton View of Historic District, designated Dayton View HD-A on the official zoning map. This area contains significant structures which show the variety of architectural styles including Queen Anne, shingle, classic revival, bungalow, prairie, and contemporary.

(E) The South-Park Historic District shall be an area
southeast of downtown Dayton designated on the official zoning map as South Park HD-A. This area's growth paralleled that of the National Cash Register Company, a significant local industry. South Park was fostered by John H. Patterson's concern for the welfare and home life of his employees and features structures built in the late-19th and early-20th centuries, primarily in the Queen Anne, Italianate, federal, and colonial revival styles.

(F) To the east of downtown Dayton shall be the

Huffman Historic District designated Huffman HD-A on the official zoning map. This area was developed by William P. Huffman and includes structures representing both upper and middle class residents. Featuring ornate Queen Anne and Italianate styled residential and institutional structures, this area typifies late-19th century history and architecture.
(Ord. 26212, passed 4-8-81)

§ 150.246 PERMITTED USES

(A) The permitted uses within the HD-A Historic District shall be those permitted uses of the underlying zoning district, except as specified in § 150.246 (B) for that portion of the district named Oregon. In addition to the allowed permitted uses, structures may be used as galleries for display of the work of professional societies active in the fields of fine art, photography, architecture, sculpture, crafts, and similar activities subject to the approval of the Historic Architecture Committee.

(B) For that portion of the HD-A Historic District named Oregon, those uses permitted as home occupations shall be those activities which require special artistic skills or manual skills of a handicraft nature for the creation or restoration of items not mass produced but reflecting the input of the individual craftsman desiring to establish the use. The Zoning Administrator may permit the use of up to 50% of the ground floor area for the home occupation with the stipulation that no more than 25% of the ground floor area, or one room, whichever is smaller, may be used as public sales area.
(Ord. 26212, passed 4-8-81)

§ 150.2461 CONDITIONAL USES.

The following conditional uses may be allowed in structures which are found to be of significant historic and architectural value by the Historic Architecture Committee and which were specifically designed and arranged, in part or in whole, for commercial use when originally constructed, but only after having complied with the requirements and approval procedures specified in §§150.453 and 150.460. No sales of alcoholic beverages by the drink, other than the sale of beer, ale, stout, and other malt liquors, and wine shall be permitted in connection with any of the uses set forth below.

(A) Antiques – retail sales
(B) Art – retail sales
(C) Artist, sculptor, designer, and composer studios.
(D) Bakeries, retail (maximum of five employees per shift.)
(E) Barber and beauty shops.
(F) Books – retail sales
(G) Candy and confectionery – retail sales.
(H) Cameras and photo supplies – retail sales.
(I) Cigars, cigarettes, and tobacco – retail sales.
(J) Dairy products – retail sales
(K) Child day-care centers
(L) Delicatessen
(M) Dressmaking, seamstress.
(N) Drugs – retail sales
(O) Eating places (maximum of five employees per shift.
(P) Florists.
(Q) Grocery, meat, and fish – retail sales.
(R) Jewelry – retail sales.
(S) Leather goods and luggage – retail sales.
(T) Newspaper substations.
(U) Offices.

(V) Photo studios.
(W) Reading rooms.
(X) Shoe repair.
(Y) Tailor shops.
(Z) Watch, clock, and jewelry repair.
(Ord. 26212, passed 4-8-81)

§ 150.247 BULK AND YARD REGULATIONS.

(A) The lot area and bulk regulations in the HD-A Historic District named Dayton View shall be those of the underlying zoning district.

(B) The lot area and bulk regulations applicable in all HD-A Historic Districts except Dayton view area as follows:

(1) Structure height. The average height of the existing buildings on the block face on which the structure is located shall determine the maximum structure height.

(2) Front yard. The minimum required front yard shall be within five feet, more or less, of the average existing front yard setback on the block face on which the structure is located.

(3) Side yards. For lots having a width less than the required 50-foot width, the total required for both side yards shall not be less than 30% of the lot width, for any one side yard the required yard shall not be less than 10% of the lot width. For other lots meeting the minimum requirements of the applicable district, the applicable yard requirements shall apply.

(4) Side yard on corner lot. The side yard on the street side of a corner lot shall be within five feet,

more or less, of the average existing front yard setback of the block face on which the side yard is required.

(6) Accessory building setbacks. There shall be no minimum required setback from the rear lot line for accessory structures serviced by a rear alley, except as may be required to provide reasonable access thereto, pursuant to § 150.350 (B). Those not serviced by a rear alley shall provide a setback from the rear lot line of not less than five feet. No part of an accessory building or structure may overhang any adjacent lot line.

(C) Creation of small lots. The creation of lots smaller than 5,000 square feet may be permitted by the City Plan Board for existing buildings and construction of new buildings provided the newly created lot and the scale of the proposed structure is in scale with the average lot size of the block on which it is located.

(D) Satellite earth stations or dish antennas. Satellite earth stations or dish antennas shall only be permitted as an accessory structure in accordance with the requirements of §§ 150.333 and 150.336, provided it is located and screened to minimize visual impact on the historic district from the street and adjacent properties. (Ord. 26212, passed 4-8-81; amend. Ord. 27348, passed 2-26-86; amend. Ord. 27467, passed 10-22-86)

§ 150.2471 ARCHITECTURAL DESIGN STANDARDS.

The following additional standards shall be complied with in the HD-A Historic District:

(A) Structural proportion. Building proportion (height,

depth, and width) for new construction shall be such that it is similar to any immediately adjacent structures on the same street, or streets of a corner lot. Any exterior modifications or additions to existing structures shall maintain the proportions of all height and length, window and door opening sizes, and roof height and slope as the original structure. New principal structures shall conform in these regards to the proportions of adjoining structures. All existing and new principal structures shall maintain a rhythm of masses to openings. Accessory structures shall conform to the proportions of the principal structure.

(B) Construction materials. Materials utilized in exterior renovations, additions, and construction of accessory or new principal structures shall either match the appearance of the materials used in construction of the original buildings or shall be modern construction materials which create the same effect and shall not be a cosmetic treatment which simulates original fabric.

(C) Colors. All exterior colors shall be appropriate to the architectural style and time period in which the structure was built. Visual relationships of the streetscape shall be maintained. Accents or blending trim colors shall be used.

(D) Decorative details. Items such as chimneys, gutters, downspouts, gables, soffits, hardware, fences, light fixtures, walks, and shutters shall be compatible with the architectural style of the principal structure. Materials used for, and design of decorative details shall be modern reproductions which create the same effect.

(E) Rehabilitation of existing surfaces. Techniques utilized in the rehabilitation of existing exterior surfaces

shall be sympathetic to the surface materials. Sandblasting of any exterior surfaces shall be prohibited.

(F) Interior arrangement. The rearrangement of interior structural elements, including load bearing walls, openings in those walls, columns, joists, girders, trusses, rafters, and lintels shall not be allowed unless the plan for such rearrangement is accompanied by a certificate from a licensed architect or engineer that such rearrangement is not likely to result in structural damage.
(Ord. 26212, passed 4-8-81)

§ 150.248 REMOVAL OF STRUCTURES.

(A) An application for a demolition permit in the HD-A Historic District requires an approved application for a certificate of appropriateness. Reuse plans for the parcel will be included. A performance bond, in an amount sufficient to assure site restoration, shall be posted with the Division of Building Inspection.

(B) In cases in which a property owner applied for a certificate of appropriateness to demolish a building within a designated historic district, additional evidence will also be submitted to the Zoning Administrator by the applicant that one or more of the following conditions prevail:

(1) That the building proposed for demolition is not inherently consistent, in regard to those characteristics designated in § 150.234 with other structures in its designated portion of the historic district.

(2) That the building contains no features of special architectural and historic significance.

(3) That there exists no reasonable economic use for the building as it exists or as it might be rehabilitated, and that there exists no feasible and prudent alternative to demolition, or that deterioration has progressed to the point where it is not economically feasible to rehabilitate the building.

(C) If the Zoning Administrator finds that application for demolition does not meet the above criteria, the application for permit shall be denied.
(Ord. 26212, passed 4-8-81)

§ 150.2481 OFF-STREET PARKING AND LOADING.

(A) For permitted used within the boundaries of the HD-A district, off-street parking and loading requirements shall be required as per §§ 150.344 through 150.353. The following additional regulations shall apply to the location of such facilities within the HD-A District:

(1) No required off-street parking or loading space shall be located in any required front yard, except for those areas originally providing for such parking.

(2) Grouped off-site parking where required is permitted but shall be done in a manner which will not have an adverse effect upon the appearance of the property or of the district.

(B) Off-street and off-site parking spaces shall be considered modifications to the property on which they are located, potentially affecting the view of the streetscape,

and shall be subject to the review of the Historic Architecture Committee.
(Ord. 26212, passed 4-8-81)

§ 150.249 SIGNS.

(A) The sign regulations of the underlying zoning districts shall apply to the HD-A District. The following additional regulations shall apply to signs located within the HD-A District.

(1) Billboards and portable signs are prohibited.

(2) Moving and flashing signs are prohibited.

(3) Signs extending above the wall of any structure to which they are attached are prohibited.

(4) Advertising signs are prohibited.

(5) Identification signs in scale with the building on which they are located are permitted, however, they shall not exceed 100 square feet of total sign area. Sign scale shall be determined by the mathematical ratio of the height and width of the structure on which the sign is to be located or that portion thereof. Projecting identification signs may not exceed 32 square feet, or 16 square feet per face. Two or less signs per use are permitted.

(6) Sign illumination and exterior lighting is permitted, however, it shall be consistent with the general architectural standards of the HD-A district.

(7) All free standing and ground projecting signs shall be prohibited in the HD-A District except for traffic-control and Historic District identification signs.

(8) Short term or temporary signs are permitted and no certificate of appropriateness is required, provided, they are only displayed for a maximum of 7 consecutive days, have a maximum size of 20 inches by 30 inches and display only one sign.

(B) In the HD-A District, signs shall be considered exterior modifications of the structure on which they are located and shall be subject to the review of the Historic Architecture Committee.
(Ord. 26212, passed 4-8-81; amend. Ord. 27467, passed 10-22-86) Penalty, see § 150.999

HD-T TRANSITIONAL HISTORIC DISTRICT

§ 150.250 PURPOSE.

The HD-T Transitional Historic District is an overlay district designed to serve as a transitional zone between HD-A Districts and surrounding land uses. These transitional areas are located adjacent to their respective HD-A Historic Districts. Structures represented in this area share common historical backgrounds and architectural styles with their counterparts in the HD-A Districts but, due to different growth factors, deserve separate and special consideration.
(Ord. 26212, passed 4-8-81)

§ 150.251 PERMITTED USES.

The permitted used within the HD-T Transitional Historic District shall be those permitted uses of the underlying zoning district.
(Ord. 26212, passed 4-8-18(sic))

§ 150.2511 CONDITIONAL USES.

The conditional uses within the HD-T Transitional Historic district shall be those conditional uses of the underlying zoning district and those home occupations listed in § 150.342. These conditional uses may be allowed only after having complied with the requirements and approval procedure specified in §§150.453 through 150.460.
(Ord. 26212, passed 4-8-81)

§ 150.252 BULK AND YARD REGULATIONS.

The lot area and bulk regulations in the HD-T Historic District shall be those of the underlying zoning district for that portion of the District named South Park. In the remaining portions of the District the following regulations shall also apply:

(A) Structure height. The height of a new principal structure shall not vary from the average heights of the principal structures on either side of it by more than 10%. In the case of new structures proposed for a corner lot or lots for which an average height cannot be determined, the Historic Architecture Committee shall prescribe the height range.

(B) Separation. When space is left between buildings, and fences or walls, the minimum horizontal distance of such space shall be three feet.

(C) Satellite earth stations or dish antennas. Satellite earth stations or dish antennas shall only per permitted as an accessory structure in accordance with requirements in §§150.333 and 150.336, provided it is located and screened to minimize visual impact on the historic district from the street and adjacent properties.

(Ord. 26212, passed 4-8-81; amend. Ord. 27348, passed 2-26-86)

§ 150.2521 ARCHITECTURAL DESIGN STANDARDS.

(A) The following additional standards shall be applicable to the HD-T Historic District except as modified for that portion of the HD-T named South Park.

(1) Structural proportion. Building proportion (height, depth, and width) for new construction shall be such that it is similar to any immediately adjacent structures on the same street, or any streets of a corner lot. Any exterior modifications or additions to existing structures shall maintain the proportions of wall height and length, window or door opening sizes, and roof height and slope as the original structure. New principal structures shall conform in these regards to the proportions of adjoining structures. All existing and new principal structures shall maintain a rhythm of masses to openings. Accessory structures shall conform to the proportions of the principal structure.

(2) Construction materials. Materials utilized in exterior renovations, additions and construction of accessory or new principal structures shall either match the appearance of the materials used in construction of the original buildings or shall be modern construction materials

which create the same effect and shall not be a cosmetic treatment which simulates original fabric.

(3) Colors. All exterior colors shall be appropriate to the architectural style and time period in which the structure was built. Visual relationships of the streetscape shall be maintained. Accents or blending trim colors shall be used.

(4) Decorative details. Items such as chimneys, gutters, downspouts, gables, soffits, hardware, fences, light fixtures, walks, and shutters shall be compatible with the architectural style of the principal structure. Materials used for the design of decorative details shall be modern reproductions which create the same effect.

(7) Rehabilitation of existing structures. Techniques utilized in the rehabilitation of existing exterior surfaces shall be sympathetic to the surface materials. Sandblasting of any exterior surfaces shall be prohibited.

(6) Interior arrangement. The rearrangement of interior structural elements, including load bearing walls, columns, joists, girders, trusses, rafters, or lintels, shall not be allowed unless the plan for such rearrangement is accompanied by a certificate from a licensed architect or engineer that such rearrangement is not likely to result in structural damage.

(B) For that portion of the HD-T named South Park only divisions (3), (4), and (5) from division (A) above applies.
(Ord. 26212, passed 4-8-81)

§ 150.253 REMOVAL OF STRUCTURES.

(A) An application for a demolition permit in the HD-T Historic District requires an approved application for a certificate of appropriateness except as modified below for that portion of the district named South Park. Reuse plans for the parcel will be included. A performance bond, in an amount sufficient to assure site restoration, shall be posted with the Division of Building Inspection.

(B) In cases in which a property owner applied for a certificate of appropriateness to demolish a building within a designated historic district, additional evidence will also be submitted to the Zoning Administrator by the applicant that one or more of the following conditions prevail:

(1) That the building proposed for demolition is not inherently consistent, in regard to those characteristics designated in §150.234 with other structures in its designated portion of the Historic District.

(2) That the building contains no features of special architectural and historic significance.

(3) That there exists no reasonable economic use for the building as it exists or as it might be rehabilitated and that there exists no feasible and prudent alternative to demolition, or that deterioration has progressed to the point where it is not economically feasible to rehabilitate the building.

(C) If the Zoning Administrator finds that application for demolition does not meet division (B) above, the application for permit shall be denied.

(D) This section does not apply to the portion of the HD-T Historic District named South Park.

(Ord. 26212, passed 4-8-81)

§ 150.2531 OFF-STREET PARKING AND LOADING

(A) For permitted uses within the boundaries of the HD-T Historic District, off-street parking and loading requirements shall be required as per §§150.344 and 150.353. The following additional regulations shall apply to the location of such facilities within the HD-T District.

(1) No required off-street parking or loading space shall be located in any required front yard, except for those areas originally providing for such parking.

(2) Grouped off-site parking where required is permitted, but shall be done in a manner which will not have an adverse effect on the appearance of the property or of the district. Such lots should reduce interference with pedestrian and vehicular traffic by minimizing curb cuts and sidewalk crossings.

(B) Off-street and off-site parking spaces shall be considered modifications to the property on which they are located, potentially affecting the view of the streetscape, and shall be subject to the review of the Historic Architecture Committee.
(Ord. 26212, passed 4-8-81) Penalty, see § 150.999

§ 150.254 SIGNS.

(A) The sign regulations of the underlying zoning districts shall apply to the HD-T District. The following additional regulations shall apply to signs located within the HD-T district.

(1) Billboards and portable signs are prohibited.

(2) Moving and flashing signs are prohibited.

(3) Signs extending above the wall of any structure to which they are attached are prohibited.

(4) Advertising signs are prohibited.

(5) Identification signs in scale with the building on which they are located are permitted, however, they shall not exceed 100 square feet of total sign area. Sign scale shall be determined by the mathematical ratio of the height and width of the structure on which the sign is to be located or that portion thereof. Projecting identification signs may not exceed 32 square feet, or 16 square feet per face. Two or less signs per use are permitted.

(6) Sign illumination and exterior lighting is permitted, however, it shall be consistent with the general architectural standards of the HD-T district.

(8) Short term or temporary signs are permitted

and no certificate of appropriateness is required, provided, they are only displayed for a maximum of 7 consecutive days, have a maximum size of 20 inches by 30 inches and display only one sign.

(B) In the HD-T District, signs shall be considered exterior modifications of the structure on which they are

located and shall be subject to the review of the Historic Architecture Committee.
(Ord. 26212, passed 4-8-81; amend. Ord. 27467, passed 10-22-86)
Penalty, see §150.999

HD-L LANDMARK HISTORIC DISTRICT

§150.255 PURPOSE.

The HD-L Landmark Historic District is an overlay historic district applicable to single lots or small groups of lots containing historic structures, requiring the protection of the special controls of this district, and listed below:

Name/Address	Lot/Parcel ID No.
1815 Brown Street Rubicon Farm	16052/R72-30-6-32-36, 53, 55-57, 59-69
240 Central Avenue Elder House	7529/R72-65-1-28
307 Central Avenue Davisson House	7584/R72-66-9-38
338 Central Avenue Hawker House	7636/R72-66-9-2
300 College Park Drive St. Mary's Hall	2-1-MRS/R72-66-9-2
3525 Dandridge Avenue Daniel Miller House	67483/R72-157-1-135
800 West Fifth Street Women's Christian Association	9859/R72-85-8-24
815 West Fifth Street Classic Theater	6500/R72-85-3-23,24
35 East First Street	40/R72-3-10-26

Dr. Jefferson Walters House	
41 East First Street James Brook House	40/R72-3-10-24
1012 Huffman Avenue Phillip Gilbert House	18359/R72-42-5-60
1428 Huffman Avenue Charles and Susan Gummer House	39653/R72-43-6-3
31 South Jersey Street Fire Station #16	17658/R72-46-10-19
24 Klee Street John R. Reynolds House	26243/R72-42-8-51
20 Livingston Avenue Alta Nursing Home	23191/R72-42-8-3
225 North Ludlow Street Dayton Woman's Club	17/R72-1-7-32
45 South Ludlow Street Dayton Daily News Building	176/R72-5-1-41
7 North Main Street Old Court House	132/R72-2-4-13
138 North Main Street Victory Theater	59/R72-2-5-1
1422 North Main Street Fire Station # 14	19609/R72-60-7-37
4 South Main Street American Building	155/R72-5-7-1-4, 14-16
40 South Main Street Centre City Building	182/R725-7-54-58
43 South Main Street Kuhn's Building	180/R72-5-2-27-29
657 South Main Street Kelly Family House	7506/R72-18-1-13

908 South Main Street Rudolph Pretzinger House	O.L.97/R72-18-5-1
208 West Monument Avenue Isaac Pollack House	74691/R72-1-7-13
405 West Riverview Avenue Dayton Art Institute	9820/R72-65-11-1-12
53 Sherman Street Newcom House	10127/R72-21-3-52
22 East Third Street Lafee Building	155/R72-5-7-17
4 West Third Street Dayton Arcade	157/R72-2-5-8-16, 31-41,50
118 West Third Street Old Post Office	162/R72-2-1-1-7, 45
131 West Third Street Dayton Bicycle Club	126/R72-2-3-13, 14
4100 West Third Street Veterans' Administration Center	75722/R72-169-1-35
801 Wayne Avenue Althoff's Millinery Shop	8455/R72-19-10-45, 46
805-807 Wayne Avenue Breslaw Store and Residence	8454/R72-19-10-43, 44
809 Wayne Avenue Waugh Residence	8453/R72-19-10-42
815 Wayne Avenue Beck Office and Residence	8452/R72-19-10-42
819 Wayne Avenue Kette Residence	8451/R72-19-10-40

823-825 Wayne Avenue Eichner's Saloon	8450/R72-19-10-39
911-913 Wayne Avenue Baggott's Second Hand Store	8445/R72-19-10-12
925 Wayne Avenue Seeger Grocery	8444/R72-19-10-11, 58
1101 Wayne Avenue Lake's Variety and Dry Goods Store	8420/R72-27-5-50
1109-1111 Wayne Avenue Victorian Double Residence	8418/R72-27-5-52
1113 Wayne Avenue Second Empire Residence	8417/R72-27-5-54
1126 Wayne Avenue Victorian Store and Residence	3844/R72-26-1-22, 56
1132 Wayne Avenue Queen Anne Store and Residence	3845/R72-26-1-23
1201 Wayne Avenue Lorenz Grocery	5335/R72-27-4-23
1633 Wayne Avenue Samuel N. Brown House	7355/R72-28-11-79, 80, 52
2335 Wayne Avenue Dayton State Hospital	33-2-7-MRS/R72-143-1-32,33

(Ord. 26212, passed 4-8-81; Am. Ord. 26347, passed 10-7-81)

§ 150.256 PERMITTED USES.

The permitted uses within the HD-L Landmark Historic District shall be those permitted uses of the underlying zoning district, except home occupations.

(Ord. 26212, passed 4-8-81)

§ 150.2561 CONDITIONAL USES.

The conditional uses within the HD-L Landmark Historic District shall be those conditional uses of the underlying zoning district and those home occupations listed in § 150.342 of this chapter. These conditional uses may be allowed only after having complied with the requirements and approval procedure specified in § § 150.453 through 150.460.
(Ord. 26212, passed 4-8-81)

§ 150. 257 BULK AND YARD REGULATIONS.

The lot area and bulk regulations in the HD-L Landmark Historic District shall be those of the underlying zoning district, except the following additional regulations shall also apply:

(A) Structure Height. The height of a new principal structure shall not vary from the average of the heights of the principal structures on either side of it by more than 10%. In the case of new structures proposed for a corner lot or lots for which an average height cannot be determined, the Historic Architecture Committee shall designate an appropriate structure height range.

(B) Side Yards. For lots having a width less than the required 50 feet, the total of both side yards shall be not less than 30 % of the lot width and no side yard shall be less than 10 % of the lot width.

(C) Separation. When space is left between buildings and other buildings, and fences or walls, the minimum horizontal distance of such space shall be three feet.

(D) Satellite earth stations or dish antennas. Satellite earth stations or dish antennas shall only be permitted as an accessory structure in accordance with requirements in §§ 150.333 and 150.336, provided it is located and screened to minimize visual impact on the historic district from the street and adjacent properties.

(Ord. 26212, passed 4-8-81; amend. Ord. 27348, passed 2-26-86)
Penalty, see § 150.999

§ 150.2571 ARCHITECTURAL DESIGN STANDARDS.

The following standards shall be complied with in the HD-L Landmark Historic District, either in whole or in part, as determined by the Historic Architecture Committee:

(1) That there exists no reasonable economic use for the
building as it exists or as it might be rehabilitated, and that there exists no feasible and prudent alternative to demolition, or that deterioration has progressed to the point where it is not economically feasible to rehabilitate the building.

(2) If the Zoning Administrator finds that the application for demolition does not meet the above criteria, the application for permit shall be denied.
(Ord. 26212, passed 4-8-81)

§ 150.2581 OFF-STREET PARKING AND LOADING.

(A) For permitted uses within the boundaries of the HD-L
District, off-street parking and loading requirements shall be required as per §§ 150.344 through 150.353. The following additional regulations shall apply to the location of such facilities within the HD-L District:

(1) No required off-street parking or loading space shall be located in any required front yard, except for those areas originally providing such parking.

(2) Grouped off-site parking where required is permitted but shall be done in a manner which will not have an adverse effect on the appearance of the property or of the district.

(B) Off-street and off-site parking spaces shall be considered modifications to the property on which they are located potentially affecting the view of the streetscape and shall be subject to the review of the Historic Architecture Committee.
(Ord. 26212, passed 4-8-81)

§150.259 SIGNS.

(A) The sign regulations of the underlying zoning districts shall apply to the HD-L District. The following additional regulations shall apply to signs within the HD-L District.

(1) Billboards and portable signs are prohibited.

(2) Moving and flashing signs are prohibited.

(3) Signs extending above the wall of any structure to which they are attached are prohibited.

(4) Advertising signs are prohibited.

(5) Identification signs in scale with the building on which they are located are permitted, however, they shall not exceed 100 square feet of total sign area. Sign scale shall be determiend by the mathematical ratio of the height and width of the structure on which the sign is to be located or that portion thereof. Projecting identification signs may not exceed 32 square feet, or 16 square feet per face. Two or less signs per use are permitted.

(6) Sign illumination and exterior lighting is permitted, however, it shall be consistent with the general architectural standards of the HD-L District.

(7) All free standing and ground projecting signs shall be prohibited in the HD-L District except for traffic-control and Historic District Identification signs.

(8) Short term or temporary signs are permitted and no certificate of appropriateness is required, provided, they are only displayed for a maximum of 7 consecutive days, have a maximum size of 20 inches by 30 inches and display only one sign.

(B) In the HD-L District, signs shall be considered exterior modifications of the structure on which they are located and shall be subject to the review of the Historic Architecture Committee.

(Ord. 26212, passed 4-8-81; amend. Ord. 27467, passed 10-22-86)
Penalty, see §150.999

PLANNED DEVELOPMENTS

§ 150.260 PURPOSE.

The use of improved modern techniques for land development is often difficult under traditional zoning regulations designed to control single buildings on individual areas within the central area of the city. The advantageous development of larger areas of substantially open land within the city requires that a flexible approach be available in land use control. This section is intended to permit Residential, Office-Residential, University, Business or Industrial Planned Developments in those areas where such development would be appropriate and would benefit and meet the needs of the citizens of the city. (Ord. 22852, passed 2-7-68; amend. Ord. 23348 § 2273, passed 4-30-69)

The use of improved modern techniques for land development is often difficult under traditional zoning regulations designed to control single buildings on individual areas within the central area of the city. The advantageous development of larger areas of substantially open land within the city requires that a flexible approach be available in land use control. This section is intended to permit Residential, Office-Residential, University, Business or Industrial Planned Developments in those areas where such development would be appropriate and would benefit and meet the needs of the citizens of the city. (Ord. 22852, passed 2-7-68; amend. Ord. 23348 § 2273, passed 4-30-69)

§ 150.261 APPLICATION.

An application seeking permission to construct a Planned Development:

(A) In a Residential, Office-Residential or University District on a tract or parcel of land containing an aggregate of at least 10 dwelling units or not less than one acre of land;

(B) In a Business District on a tract or parcel of land containing not less than 2 acres of land; or

(C) In an Industrial District on a tract or parcel of land containing not less than 10 acres of land; may file an application for a Planned Development with the Plan Board. (Ord. 22852, passed 2-7-68; amend. Ord. 23348 §2274, passed 4-30-69)

SUPREME COURT, U.S.
FILED
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OFFICE OF THE CLERK

No. 98-1320

In The

Supreme Court of the United States

October Term, 1998

BSW DEVELOPMENT GROUP,

Petitioner,

vs.

CITY OF DAYTON, OHIO,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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32 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

I. PETITIONER MISSTATES THE FACTS CONCERNING THE PROPERTY'S ELIGIBILITY FOR HISTORIC LANDMARK STATUS 1

II. PETITIONER MISSTATES THE FACTS AS TO THE CONDITION OF THE BUILDING AT THE TIME THE DEMOLITION PERMIT WAS SOUGHT 4

III. PETITIONER MISREPRESENTS THE CONDITION OF THE REAL ESTATE MARKET 7

IV. PETITIONER MISREPRESENTS THE EFFECT OF THE "REUSE PLAN" REQUIREMENT 7

V. PETITIONER MISREPRESENTS THE FINDINGS OF THE SPECIAL MASTER 11

VI. PETITIONER MISREPRESENTS THE FINDINGS OF FACT OF THE OHIO SUPREME COURT, COURT OF APPEALS, AND SPECIAL MASTER 13

REASONS FOR DENYING THE WRIT 15

I. THE EVIDENCE AND TESTIMONY ESTABLISHED THE COMMERCIAL USE AND ECONOMIC VIABILITY OF THE PROPERTY – NO DISPUTE AS TO THE DEFINITION OF THE PHRASE "ECONOMICALLY VIABLE" WAS RAISED IN THE LOWER COURTS 16

TABLE OF CONTENTS – Continued

Page

II. THIS CASE DOES NOT INVOLVE ANY CONFLICT REGARDING THE STANDARD OF A TAKING, EITHER PERMANENT OR TEMPORARY 20

III. NO CONFLICT BETWEEN COURTS EXISTS ... 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Goldberg Cos., Inc. v. Council of Richmond Hts., 81 Ohio St.3d 207, 690 N.E.2d 510 (1998) 14

Goldsblatt v. Hempstead, 369 U.S. 590 (1962) 19

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 17

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 19

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 17, 28

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 17

Ruckleshaus v. Monsanto, 467 U.S. 986 (1984) 16, 17

Seawall Associates v. City of New York, 542 N.E.2d 1059 (N.Y. 1989) 26, 27, 28

Sintra, Inc. v. Seattle, 829 P.2d 765 (Wash. 1992), *cert. denied, Seattle v. Robinson*, 506 U.S. 1028 (1992) 23, 24

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 9, 17, 18, 20, 22, 23

STATEMENT OF THE CASE

In 1984, the BSW Development Group ("BSW") acquired the Wilcon Building at 16-26 South Patterson Boulevard and an adjacent building, which constituted an entire block in the city of Dayton, Ohio. APP., p. 55. The purchase price of the entire city block was $315,000. APP., p. 2. A portion of the land, other than the building and property at issue in this case, was sold for $250,000. APP., p. 2. BSW then had a total investment remaining of $65,000 for the property.

Originally constructed in 1876, the Wilcon Building was one of Dayton's oldest warehouses, and one of the few industrial buildings still standing along the route of the Old Miami-Erie Canal. APP., p. 55. Known historically as the "Gebhart-Pope Mill," the structure had been used primarily as a linseed oil manufacturing plant, a flour mill and a tobacco warehouse.

In 1985, the City of Dayton reviewed the Wilcon Building site and determined it to be eligible for listing as a national historic landmark on the Ohio Historical Inventory.

I. PETITIONER MISSTATES THE FACTS CONCERNING THE PROPERTY'S ELIGIBILITY FOR HISTORIC LANDMARK STATUS.

Contrary to Petitioner's factual assertion, the State had not rejected listing of the building. The alleged "rejection" was a rejection of a historical "district," which did not specifically relate to the Wilcon Building itself. The district, which included essentially three or four city

blocks, was rejected in approximately June of 1985. Thereafter, a separate Ohio Historical Inventory form to the Ohio Historical Society was filed with respect to the property itself, indicating the property was eligible. There is no dispute that the property itself was eligible for listing under the Ohio Historical Inventory. APP., p. 56.

At the time BSW purchased the property, the building housed three tenants operating three separate businesses out of the premises. APP., p. 1. One-third of the building was occupied by Dayton Tire Sales, a retail tire business, which included service bays for the installation of tires and other automotive work, as well as offices and a warehouse for the storage of tires and materials. *Id.*, APP., p. 19. Dayton Tire operated out of that building from 1973 up until it was evicted by BSW in 1989 at the time BSW applied for the demolition permit. At the time of its eviction, Dayton Tire was paying approximately $23,000 per year in rent for the space it occupied. APP., pp. 2, 23.

Another one-third of the building was occupied by a mechanical contracting company, Wat-Kem Contractors. That portion of the property was also used as office-warehouse space. It is not clear when Wat-Kem exited the premises.

The remaining one-third of the building was occupied by Wilcon Construction Company, a general contractor. APP., p. 1. The owner of Wilcon Construction, Dennis Williams, is a partner in BSW, the owner and landlord of the building. Wilcon used its portion of the building for office space, a millwork shop and storage. Wilcon began

operating out of the building in 1976, eight years before BSW purchased the site.

Wilcon Construction later expanded its operation in the building and moved its offices from the second floor to the third floor. APP., p. 2. At that time, Wilcon Construction refurbished its one-third of the Wilcon Building, leveling the floors, putting in carpeting, putting up drywall, and remodeling the entire third floor. *Id.* The remodeling included the creation of new offices, a computer room and kitchen. *Id.* Wilcon also refitted the electrical and sanitary systems. *Id.* Wilcon Construction operated its business in that building from 1976 to 1989 without interruption, up to the time BSW sought a demolition permit for the building.

In 1988, BSW demolished an abandoned gas station next to the Wilcon Building and developed a three-story office building on that site. BSW continued to rent the adjacent Wilcon Building to the tenants, and collected rent up to the time it sought the demolition permit.

On March 14, 1989, BSW applied for a demolition permit for the Wilcon Building with the City of Dayton's Division of Inspectional Services. Since the Wilcon Building was eligible for listing on the National Register of Historical Places, the Landmark Commission of the City of Dayton had jurisdiction to review such demolition permit requests.

On March 29, 1989, BSW applied to the Landmark Commission for a certificate of appropriateness to obtain a demolition permit under city ordinance. City ordinance provided that the certificate of appropriateness would be issued if "the square foot cost of meeting the minimum

building code would exceed the square foot market value of similarly used and improved structures in the planning district."

Hearings were held on the request for a certificate of appropriateness in April of 1989. After testimony by witnesses, and a review of evidence, including a site inspection and testimony by independent real estate experts, the request for a certificate of appropriateness for the demolition permit was denied. BSW filed an administrative appeal of that decision.

At the time BSW sought its demolition permit, the building was still operated as an office-warehouse. At that time, BSW essentially abandoned the building. APP., p. 20. In order to prepare the building for demolition, BSW was required to evict at least one of the tenants, Dayton Tire Sales. APP., p. 20. Dayton Tire Sales did not leave the building until May of 1989, after BSW sought the demolition permit.

II. PETITIONER MISSTATES THE FACTS AS TO THE CONDITION OF THE BUILDING AT THE TIME THE DEMOLITION PERMIT WAS SOUGHT.

Contrary to Petitioner's assertions, the building was neither a dangerous fire trap nor "in need of demolition." An examination and inspection by the Dayton Building Inspector at the time the demolition permit was being considered found that the building was structurally sound and that there were only three code violations that needed remedied. APP., pp. 6, 21. Moreover, at the time

BSW applied for the demolition permit, at least one tenant, Dayton Tire Sales, was still fully operating out of the building as it had for the previous 18 years.

BSW essentially abandoned the building after evicting Dayton Tire Sales. At that time, BSW cut all power and heat off from the building. APP., pp. 5, 20. After requesting the demolition permit, BSW performed no other maintenance of any significance on the building, other than attempting to keep trespassers out. APP., p. 22.

From the time the demolition permit was denied, BSW took no action whatsoever with respect to the building, asserting during the hearings on the certificate of appropriateness that, if it did not get the demolition permit, the City would have to "purchase" the property. Despite the fact that the property was located in the commercial district of the city of Dayton (and had housed three commercial tenants in the previous 18 years), no efforts were made to place tenants in the building, no marketing nor any other efforts were taken to use the building in any economic fashion.

The evidence at the time of the denial of the demolition permit was clear – the building had been used since 1973 as an office-warehouse by several commercial tenants. Tenants operated in the building, paying rent up until the date BSW sought the demolition permit. At least one of the tenants had to be evicted in order to completely abandon the building. Because BSW chose not to use the property, operate any business out of the property, or even market the property as a business, and took

no action to maintain the building, BSW could not credibly claim that the denial of the demolition permit created a "taking" of the property.

After the denial of the demolition permit, BSW asserted an administrative appeal to the common pleas court. In that appeal, BSW asserted several other claims in addition to its administrative appeal, including alleged constitutional violations.

In July of 1991, during the pendency of the administrative appeal, BSW filed a separate lawsuit against the City of Dayton, seeking declaratory judgment and alleging a "taking" of the property. That lawsuit was eventually dropped by BSW.

The administrative appeal was referred to a visiting judge and, eventually, a judgment was rendered on the administrative appeal on December 4, 1991. In that decision, the trial court found the application of Dayton's Historical District Ordinance was unconstitutional.

The City of Dayton appealed that decision and, on May 7, 1993, the Court of Appeals for the Second Appellate District rendered its decision. In that decision, the Court of Appeals held that the constitutionality of the statute was not necessary to determine the administrative appeal and that, based on the evidence presented at the hearings, the requirements of the ordinance were met and the Landmark Commission incorrectly denied the certificate of appropriateness for the demolition permit. APP., pp. 57-59. The Court determined that BSW should have been granted the demolition permit, but that the constitutionality of the statute was unnecessarily decided.

Based on the Court's decision, the City of Dayton notified BSW that it was prepared to issue a certificate of appropriateness for a demolition permit immediately. APP., p. 34. However, BSW refused to apply for the demolition permit and refused to take any action with respect to demolishing the bu..ding, based on its position, as it had been from the beginning, that the City of Dayton had "taken" its property by originally denying the demolition permit. APP., p. 34.

III. PETITIONER MISREPRESENTS THE CONDITION OF THE REAL ESTATE MARKET.

Contrary to Petitioner's claims, the "downturn" in the real estate market did not occur in 1993. The evidence at the hearings in this case demonstrated that the economic downturn occurred in 1988, **before** BSW sought the demolition permit. BSW's own expert acknowledged that the proposed development by BSW would have been "difficult" at best in 1988, if BSW had gone forward with the proposed development.

IV. PETITIONER MISREPRESENTS THE EFFECT OF THE "REUSE PLAN" REQUIREMENT.

Petitioner misstates the record when it claims that the "request" for a "reuse plan" was not a "simple one to fulfill." Both the Court of Appeals and the Ohio Supreme Court noted that the request for a reuse plan was a ministerial function and did not require any specific use, nor any detailed plans for any specific kind of development. APP., pp. 4, 41. The Court of Appeals noted that seeding and grading the lot could have been a proposed

use and that the "reuse plan" requirement was not a bar to using the property after 1993. APP., p. 41.

Thereafter, BSW filed its next lawsuit, alleging a taking and other federal claims, in state court. Based on the predominance of the federal claims, the matter was removed to federal court. At that time, the federal district court noted that one of the plaintiff's claims, the "takings" claim, was not ripe and dismissed that claim, noting that the appropriate procedure in Ohio is to seek to compel eminent domain proceedings via mandamus. Thereafter, BSW filed this action in the Ohio Court of Appeals, seeking a writ of mandamus to compel the City to condemn the property.

In the Court of Appeals, BSW filed for summary judgment on its request for mandamus, submitting evidence and documentation to support its claim for a "taking." The City of Dayton responded and, on March 27, 1996, the Court of Appeals for Montgomery County, Ohio, Second Appellate District, issued its decision. APP., p. 31.

The court held that BSW's alleged inability to currently develop the property was due to BSW's own inaction, which could not support any argument that the government had taken its property. APP., p. 41. The Court further noted that the demolition permit was available to BSW and that no obstacles existed in its attempt to obtain such a permit. *Id.* The court held that the submission of a reuse plan was an insubstantial and ministerial requirement and that BSW was not prohibited by the City from obtaining a demolition permit in 1993. APP., pp. 41, 52.

The Court of Appeals held that no permanent "taking" existed. APP., p. 41. The Court of Appeals then examined BSW's claim of a "temporary taking" during the time when the demolition permit was denied, from 1989 to 1993. APP., p. 42. In so reviewing the "temporary taking" issue, the Court of Appeals noted the standard under which it reviewed such a claim by quoting from the United States Supreme Court decision in *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, as follows:

> *Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.*

APP., p. 44 (quoting *United States v. Riverside Bayview Homes, Inc.*, (1985), 474 U.S. 121, 126-27 (emphasis in Court of Appeals Decision). The Court of Appeals for Montgomery County, Ohio, then stated the remaining issue to be determined for a "temporary taking" as follows:

> **Therefore, the true question is whether the denial precluded BSW's "economically viable" use of the Wilcon property.**

APP., p. 44 (citations omitted).

The Court of Appeals then reviewed the remaining evidence as to the question of "economically viable" use of the property. The Court noted that it was considering and reviewing the remaining evidence for determination of "economically viable" use. APP., pp. 44-45.

The Court of Appeals found that the Wilcon property had been used as a commercial warehouse prior to BSW's application for a demolition permit. APP., p. 46. Moreover, the property retained an "as is" value of $220,000. APP., p. 46. The Court noted there was no reason the Wilcon Building could not be used as an office-warehouse after the denial of the demolition permit and that the permit denial did not result in the property losing rental value or resale potential. APP., p. 46.

However, Dwight Brannon, a partner in BSW and the attorney representing BSW in the case, filed his own affidavit stating that the permit denial rendered the property "unmarketable and useless." *Id.*, p. 52. As a result, the Court referred the matter for an evidentiary hearing to determine whether the City's 1989 denial of a demolition permit deprived BSW of all use of its property. APP., p. 53. That charge was based upon the Court of Appeals' previous determination and evaluation of a "temporary taking," i.e., the issue involving continuing "economically viable" use.

Hearings were held on three separate days, and several witnesses, including expert witnesses, were called by both parties. After hearing all testimony, evaluating the witnesses' demeanor, and examining the testimony at issue, the Special Master issued a report and recommendation finding that BSW had not been denied use of the premises. APP., p. 18.

V. PETITIONER MISREPRESENTS THE FINDINGS OF THE SPECIAL MASTER.

In the factual findings, the Special Master did not hold that viable use existed solely because BSW used the premises for paid public parking and the storage of wrecked vehicles. To the contrary, the Special Master specifically found that the building had valid and marketable use as an office-warehouse, the identical use to which the property had been put in the decades before BSW sought the demolition permit. APP., pp. 21-22.

In the findings of fact, the Special Master found that, during the years the building was owned by BSW, it was occupied by three separate businesses that operated out of the building, up to the time BSW sought the demolition permit. One of the tenants, Dayton Tire Sales, operated out of the building for 18 years before being evicted by BSW. APP., p. 20. The Special Master found that Dayton Tire Sales, at the time it was evicted, was paying $23,000 annually in rent. *Id.* The Special Master further noted that Wat-Kem, another tenant of the building, also operated out of the building and used one-third of the building as an office-warehouse. *Id.* Wat-Kem operated a mechanical contracting business out of the building.

In addition, the remaining one-third of the building was occupied by Wilcon Construction, a general contracting company owned by Dennis Williams, a partner in BSW Development. *Id.* Wilcon Construction had operated its business out of that building since 1976. After BSW purchased the property in 1984, Wilcon refurbished its portion of the building, creating new offices and remodeling the third floor of the building. APP., p. 2. The Special

Master found that Dennis Williams paid between $12,000 and $18,000 in annual rent at the time BSW sought the demolition permit. APP., p. 20. It was conceded at the hearing that the amount of rent charged to Wilcon Construction was nominal because of Mr. Williams' partnership in BSW.

The Special Master found that BSW voluntarily requested all power leads be disconnected and that BSW essentially abandoned the building. APP., p. 20. The Special Master found that the building would not require any significant work to reoccupy with other tenants. APP., p. 21. The Special Master found that the cost of repairing the hazards in the building that existed at the time BSW abandoned the building was not significant and that such repairs would have allowed BSW to lease those portions of the building to a tenant performing essentially the same functions as either Dayton Tire or Wilcon Corporation. The Special Master found that commercial use of the building was available at the time the demolition permit was denied and that BSW had the ability to market the property. APP., p. 22.

Although the Special Master found that BSW did make use of the premises for paid parking and the storage of wrecked automobiles, that finding was not the sole basis for denying the writ of mandamus. Essentially, the Court noted that in addition to being able to use the premises as a commercial office-warehouse, BSW made actual use of the premises. APP., pp. 20-21. BSW sold parking spaces on the remaining portions of the lot for public parking at $25 per space per month. APP., p. 21. BSW also used the premises for the storage of various items, which included wrecked cars and boats that were

being stored by Dwight Brannon as part of his legal practice. APP., p. 20.

VI. PETITIONER MISREPRESENTS THE FINDINGS OF FACT OF THE OHIO SUPREME COURT, COURT OF APPEALS, AND SPECIAL MASTER.

Contrary to Petitioner's assertion, there was no "solitary factual finding." The Special Master, the Court of Appeals, and the Ohio Supreme Court all determined that the building retained viable commercial use as an office-warehouse. APP., pp. 11-12; 46-47; 20-22. The Special Master found that portions of the building were marketable for warehouse and office space and could have been used for such purposes again. APP., pp. 20-22. The courts noted there was no significant impediment to BSW reusing the building as it had during the 18 years before the demolition permit was sought. Moreover, any problems or dilapidation of the building was the result of BSW's actions, not the City of Dayton's denial of the demolition permit. *See* APP., p. 26.

After the findings of fact and conclusions of law were submitted by the Special Master, BSW appealed that determination to the Ohio Supreme Court. In a per curium decision, the Ohio Supreme Court affirmed the lower court's ruling. In so ruling, the Ohio Supreme Court noted that the appropriate standard for review of the "takings" claim was whether the denial of the demolition permit prohibited all "economically viable use." The Court stated the standard as follows:

> BSW could only establish entitlement to appropriation proceedings if it established that Appellee's denial of the demolition permit denied BSW all economically viable use of the Wilcon Building property.

APP., pp. 10-11.

The Ohio Supreme Court noted that BSW abandoned the Wilcon Building, which abandonment resulted in a hazard to the public, including homeless persons trespassing on the property. APP., p. 5. The Ohio Supreme Court noted that BSW had the heat and electricity to the building disconnected, and ignored requests by City officials to secure the property for the safety of the public. *Id.* The Court set forth the temporary regulatory taking issue as follows:

> "In order for the landowner to prove a [regulatory] taking, he or she must prove that the application of the ordinance has infringed upon the landowner's rights to the point that there is no economically viable use of the land and, consequently, a taking has occurred for which he or she is entitled to compensation."

APP., p. 10 (citing *Goldberg Cos., Inc. v. Council of Richmond Hts.* (1998), 81 Ohio St.3d 207, 210, 690 N.E.2d 510, 512).

After reviewing the evidence and testimony submitted at the hearings, the Ohio Supreme Court affirmed the Court of Appeals, holding that BSW did not establish a compensable taking. APP., pp. 11-12. In so holding, the Ohio Supreme Court relied upon the credible evidence, including testimony by the City of Dayton's chief building official, that the Wilcon Building was structurally sound and that the building tenants would not require

new certificates of occupancy to continue previous tenants' uses. APP., p. 12. The Ohio Supreme Court found the commercial use of the premises for the years before the denial of the demolition permit could have continued and that the building could have been used for similar commercial purposes by BSW. *Id.* Finally, the Ohio Supreme Court noted that the property retained an "as is" value of $220,000. APP., p. 3.

Although the Ohio Supreme Court noted that BSW made actual use of the property for parking and storage, that was not the basis for the determination of economic viability. The facts demonstrated that the property had commercial use and viability as an office-warehouse. APP., p. 12.

The City of Dayton did not affect or prevent those continued uses during the administrative appeal of the demolition permit. BSW simply chose not to make use of those premises, made no efforts to maintain the building, and made no efforts to market the building or re-tenant the building during that time. Based on these specific factual findings, no "taking" existed, and the request for mandamus was rejected.

REASONS FOR DENYING THE WRIT

The uniquely fact-sensitive "takings" claim of Petitioner was thoroughly presented and evaluated by the courts below and does not warrant review by this Court. The decision of the Ohio Supreme Court was a patently correct application of settled law, and no conflict of law

nor any dispute as to the standard used to evaluate the claim exists.

I. THE EVIDENCE AND TESTIMONY ESTABLISHED THE COMMERCIAL USE AND ECONOMIC VIABILITY OF THE PROPERTY – NO DISPUTE AS TO THE DEFINITION OF THE PHRASE "ECONOMICALLY VIABLE" WAS RAISED IN THE LOWER COURTS.

Contrary to Petitioner's claim, this case does not present any issue as to the appropriate standard to apply in a "takings" claim. The question of the definition of the phrase "economic viability" was not raised in the courts below.

Rather, this case, as in all alleged regulatory takings, involved a complex, factual inquiry into the uses of the premises, and the uses of the property that existed at the time of the denial of the demolition permit. In this case, the evidence and testimony established that the property had viability as a commercial office-warehouse located in the City of Dayton's commercial district, as established by the property's use up until the date of the request for the demolition permit. The denial of the permit to demolish the commercial office-warehouse in no way altered or changed the viable uses to which the property had been put in the previous decades.

The United States Supreme Court has long noted that no magic formula exists to determine when a regulatory taking has occurred. *Ruckleshaus v. Monsanto*, 467 U.S.

986, 1004 (1984). A "regulatory" taking claim is intensely fact-sensitive, and the analysis itself is "essentially an ad hoc, factual inquiry." *Id.*, (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *see also Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Contrary to Petitioner's assertions, this Court has established clear and specific guidelines for examining and reviewing claims of regulatory takings. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna*, 444 U.S. at 175; *Penn Central*, 438 U.S. at 124.

The guidelines and analysis for determining a regulatory taking were applied to the evidence and testimony submitted by BSW in the three days of hearing. After carefully construing all of the evidence and the testimony by all witnesses, the Ohio Supreme Court held that the property retained economic viability during the administrative appeal of the demolition permit, and that the denial of the demolition permit did not prohibit all economically viable use, such as office-warehouse.

The Ohio Supreme Court specifically incorporated and applied the standards set forth by the United States Supreme Court in *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, 127, as to permit denials:

> A requirement that a person obtain a permit before engaging in certain use of his or her property does not itself "take" the property in any sense: after all, permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and

> the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

Id., APP., p. 10 (quoting *United States v. Riverside Bayview Homes, Inc.* (1995), 474 U.S. 121, 127, 106 S. Ct. 455, 459, 88 L.Ed.2d 419, 420). Petitioner misstates the Ohio Supreme Court's holding by claiming the Ohio Supreme Court found economic viability ***solely*** because of the uses of storage and parking onsite. To the contrary, the facts established at trial, and the holding of the Ohio Supreme Court, specifically relied upon the evidence that the building had economic viability as an office-warehouse. APP., pp. 21-22; 11-12.

What Petitioner fails to note, and what the Ohio Supreme Court, as well as the Court of Appeals, relied upon to determine economic viability was the fact that the building and the premises were used as an office-warehouse by several commercial tenants up until the time BSW sought its demolition permit. APP., pp. 11-12; 46-47; 20-22. The lower courts noted that valid commercial use as office-warehouse occurred during the 18 years before the demolition permit was sought, and that use was still available during the pendency of the administrative appeal. Specifically, the Ohio Supreme Court stated:

> The City's chief building official testified that the Wilcon Building is structurally sound and that building tenants would not require new certificates of occupancy if they continued previous tenants' uses. In addition, at least two-thirds of the building had been used by at least two different businesses for several years just before the denial of the demolition permit, and

> that portion of the building could have continued to have been used by those businesses if they had not vacated the building.

APP., p. 12. Although, the Ohio Supreme Court did note that the property was actually used for public parking and for storage after the denial of the demolition permit, those actual uses were not the sole basis for the court's determination that the property retained economic viability.

The denial of the demolition permit did not prevent or affect the property's use and function as commercial office-warehouse space. APP., pp. 12, 20-21. That use existed for at least 18 years before the demolition permit was denied and the evidence presented in the court below demonstrated that such use could have continued after the denial.

This Court has noted that government action can reduce or decrease property values and profits of a particular property without constituting a "taking." Allegations that a regulation prevents the most profitable or best use of the property do not constitute a taking. *Goldsblatt v. Hempstead*, 369 U.S. 590, 592 (1962). Rather, the standard used to gauge whether a regulation has "taken" property is "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

Evidence and testimony were presented in the court below on the issues of economic return of the premises, including rental value of the property, fair market value

of the land and building, and marketability of the property. APP., p. 3. All of the evidence was evaluated and examined, ultimately resulting in the Ohio Supreme Court's finding that the property retained economically viable use as a commercial office-warehouse and an "as is" value of $220,000. The property was not rendered "economically idle" and the facts supported the finding that no taking occurred.

II. THIS CASE DOES NOT INVOLVE ANY CONFLICT REGARDING THE STANDARD OF A TAKING, EITHER PERMANENT OR TEMPORARY.

Contrary to Petitioner's claims, the Court of Appeals did not assert that a different standard involved the review of a temporary versus permanent taking. The Court of Appeals specifically noted that the standard applicable to a temporary taking is that set forth by this Court in *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, 126-27. The Court of Appeals relied upon that decision when it set forth the remaining issue, as follows:

> In the present case, the denial of BSW's demolition permit from October 16, 1989, until our decision on May 7, 1993, is undisputed. **Therefore, the true question is whether this denial precluded BSW's "economically viable" use of the Wilcon property.**

APP., p. 44 (emphasis added).

The Court of Appeals then reviewed all of the evidence, noting that the testimony from the Landmark Commission, and other evidence, demonstrated that the

Wilcon property had been used as a commercial warehouse and office-warehouse for the decades before BSW sought the demolition permit. The Court noted, after reviewing all of the evidence, that:

> Despite these unfortunate economic circumstances, we cannot agree that the City's conduct constituted a taking of BSW's property. Prior to its application for a demolition permit, BSW utilized the Wilcon Building as a warehouse, and presumably, it could have continued doing so after the City denied its permit. At the time of BSW's permit application, the Wilcon Building allegedly retained an as-is value of $220,000. Consequently, BSW has not demonstrated that the City's permit denial precluded "all use" of the property. Therefore, pursuant to *First English, supra*, BSW has not established a temporary regulatory taking of its property.

Id., at 47. That opinion was rendered in the denial of summary judgment. However, because Petitioner's attorney, Dwight Brannon, filed his own affidavit claiming that the denial of the permit "rendered the property unmarketable and valueless," the Court of Appeals could not conclusively state that no taking had occurred and ordered a hearing on the issue before a Special Master appointed by the Court. APP., at 52.

The Court of Appeals charged the Special Master with the duty of receiving evidence and testimony to determine whether the denial of the permit denied BSW all use of the property. However, that charge was issued in the context of its decision on the summary judgment motion wherein it noted that the appropriate standard was economic viability.

The Ohio Supreme Court noted these distinctions in its decision. In a per curium decision, the Ohio Supreme Court reviewed the evidence set forth at the hearing and applied the standard of "economic viability" to the temporary taking claim as follows:

> A requirement that a person obtain a permit before engaging in certain use of his or her property does not itself "take" the property in any sense: after all, permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

APP., p. 10 (quoting *United States v. Riverside Bayview Homes, Inc.* (1995), 474 U.S. 121, 127, 106 S. Ct. 455, 459, 88 L.Ed.2d 419, 420. That is the precise standard Petitioner claims was ***not*** applied.

The crux of Petitioner's claim is succinctly set forth in the last sentence of footnote 14 of Petitioner's Brief, wherein Petitioner states that "if the Ohio Supreme Court thought it was applying the 'economically viable use' standard, the facts simply cannot support it." *See* PETITIONER'S BRIEF, p. 21, n. 14. Petitioner simply claims the facts do not support the finding that the building in question had economically viable use as an office-warehouse, the precise use that the building was put to during the preceding decades before the demolition permit was sought. That dispute with the factual findings of the lower courts creates no basis for review by this Court.

Whether other decisions in other jurisdictions are in conflict, or alleged conflict, with previous United States Supreme Court precedent creates no basis for acceptance of this case. Those decisions are not relevant to, nor involved in, the issues in this case. This case, as set forth by the Ohio Supreme Court's decision, specifically applies the "economically viable" standard argued by Petitioner and set forth in the Court's most recent pronouncement in *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121.

That is the decision relied upon by both the Court of Appeals and the Ohio Supreme Court to establish the standard applicable to the issues herein, whether the denial of the demolition permit during the time from 1989 to 1993 denied BSW economically viable use of the land. Pursuant to that standard, the Ohio Supreme Court specifically determined that economically viable use was not prohibited by the demolition permit based on the obvious valid uses of the property as an office-warehouse. Simply because BSW chose not to use the property does not mandate that economically viable use was not available.

The decisions cited from Louisiana, Delaware and California were not at issue in this case and were not asserted as a basis for judgment. Rather, the lower courts and the Ohio Supreme Court specifically applied United States Supreme Court precedent in making their determination. Thus, the alleged "conflict" simply does not exist and creates no basis for asserting a review by this Court.

The citation by Petitioner to *Sintra, Inc. v. Seattle*, 829 P.2d 765 (Wash. 1992), *cert. denied, Seattle v. Robinson*, 506

U.S. 1028 (1992), creates no basis for this Court's review. Petitioner fails to note to this Court that the property in question in *Sintra* was essentially vacant at the time the landowner acquired it, unlike the property in this case that had commercial tenants paying rent. Moreover, in *Sintra*, no tenant was evicted by the property owner. In addition, evidence was presented that the owners were unable to find tenants for the building despite repeated attempts. In this case, BSW actually evicted its tenants and never sought any new tenants for the building after the demolition permit was denied. Finally, and perhaps most importantly, the court in *Sintra* held that an issue of fact existed as to whether a taking occurred and that a trial must be held on the issue. The court in *Sintra* did *not* find that a compensable taking existed.

Unlike the decision in *Sintra*, a hearing in this case has been held, and testimony and evidence have been presented on this very issue. After three days of testimony, the courts determined that the property retained viable commercial use and that no compensable taking existed.

Essentially, the decision in *Sintra* merely reinforces the fact that all takings claims are ad hoc, factual inquiries appropriate for trial and hearing. As such, those complex factual inquiries are more appropriately resolved at the trial court and state court level and are not appropriate for review by this Court.

Petitioner further misstates the state of this case by claiming that a conflict exists between Ohio and jurisdictions in Connecticut, Rhode Island, Nebraska and Florida. Contrary to Petitioner's assertion, the state of Ohio

clearly recognizes a temporary taking action during the pendency of the administrative appeal. In fact, that was the precise holding of the Court of Appeals when it examined and reviewed BSW's petition for mandamus. The Court of Appeals for Montgomery County, Ohio, Second Appellate District, stated the following:

> As we explained above, however, BSW's current lack of a demolition permit stems from its failure to submit a reuse plan. Following this Court's May 7, 1993, decision, no other impediment prevented BSW from obtaining a permit, demolishing the building, and undertaking any use it desired. Consequently, we cannot agree that a taking of BSW's property continues to the present day. Instead, we believe the issue is whether a temporary regulatory taking occurred from October 16, 1989, when the Dayton Board of Zoning Appeals affirmed the Landmark Commission's decision denying a demolition permit, until May 7, 1993, when this Court ruled that BSW should receive a permit.
>
> * * *
>
> In the present case, the denial of BSW's demolition permit from October 16, 1989, until our decision on May 7, 1993, is undisputed. Therefore, the true question is whether this denial precluded BSW's "economically viable" use of the Wilcon property.

APP., pp. 42-44.

Thus, contrary to Petitioner's assertion, Ohio, and specifically this case, did not engage in any different approach for determining the time period for the alleged regulatory taking. The Court of Appeals for Montgomery

County, Ohio was, in actuality, in complete agreement with those jurisdictions referred to by Petitioner by specifically holding that the pertinent time period for review is when the final decision of the administrative board was made in 1989 until 1993 when BSW had the ability to use the property in any way it deemed proper. Contrary to Petitioner's assertion, there is no incompatible doctrinal approach at issue in this case. The decisions in this case were, in fact, completely in line with the precedent of this Court.

III. NO CONFLICT BETWEEN COURTS EXISTS.

Petitioner's reliance upon *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), for an alleged "conflict" creates no basis for review by this Court. Petitioner's factual predicate that *Seawall* is similar is misplaced. The facts in *Seawall* are different from the facts in this case.

In *Seawall*, the statute at issue absolutely compelled the owners of the building to restore all units to habitable condition, to lease them at controlled rents to specific individuals, and to admit specific persons as tenants. In addition, the statute absolutely prohibited demolition, alteration or conversion of the properties. The New York court found that the provisions at issue ***prevented any economically viable use*** of the properties by the owners. The New York court found that:

> Owners are forced to devote their properties to another use, which, albeit one which might serve the city's interests, bears no relation to

> any economic purpose which could be reasonably contemplated by a private investor.

Seawall Associates, 542 N.E.2d at 1065. The court in *Seawall* specifically found that "by any test, we think these restrictions deny the owners 'economically viable use' of their properties." *Id*. The decision in *Seawall* is not in conflict with the Ohio Supreme Court's decision. *Seawall* stands for nothing more than the undisputed proposition that the denial of all economically viable use of a property can constitute a taking.

Unlike *Seawall*, the Ohio Supreme Court held that the denial of the demolition permit did not deny economically viable use of the properties. Rather, the evidence clearly demonstrated that the property purchased by BSW could be used for the same identical purposes for which the property was put in the decades before the demolition permit was sought, and in the five years that BSW owned the building before it sought the demolition permit. APP., pp. 11-12; 20-22. Unlike the decision in *Seawall*, BSW owned and operated the building as a commercial office-warehouse premises for a period of five years before it sought the demolition permit. The demolition permit did not stop, alter or prohibit those continued uses during the administrative appeal.

Economic viability was not affected in any way by the denial of the demolition permit. Further, the decision in *Seawall* relates to a specific statute, which directly and completely regulated the identical uses that could be made of the property. No such statute is at issue in this case.

The reliance on the "bundle of sticks" analogy to create a conflict in this matter is misplaced. In fact, the court in *Seawall* identified the ***very distinction*** that demonstrates ***why*** no conflict exists. The *Seawall* court acknowledged the United States Supreme Court decision in *Penn Central Transp. Co. v. New York City*, 505 U.S. 1003 (1978), as demonstrating a relevant distinction from the facts in *Seawall*. The court noted that distinction as follows:

> The effect of Local Law No. 9 is unlike that of the landmarks law in *Penn Central*, which denied the owner of Penn Central neither the continued full use of its property nor a reasonable return on its investment.

Id., at 1066.

Just as in *Penn Central*, the owners in this case (BSW) were not denied the continued full use of their property nor a reasonable return on their investment. The evidence and testimony at the hearing established that the building could continue to be used effectively as an office-warehouse.

As a result, no conflict exists between Ohio and the 1989 New York decision, and that decision does not create any basis for review by this Court.

CONCLUSION

Based on the foregoing, Respondent submits no basis exists for this Court's review and that BSW's petition should be denied.

Respectfully submitted,

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(3)

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No. 98-1320

In The

Supreme Court of the United States

October Term, 1998

BSW DEVELOPMENT GROUP,

Petitioner,

vs.

CITY OF DAYTON, OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Ohio

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THERE ARE TWO KEY ELEMENTS FROM WHICH THE CITY CANNOT ESCAPE: (1) ITS PERMIT DENIAL WAS HELD TO BE ILLEGAL, AND (2) THE SPECIAL MASTER WAS DIRECTED *ONLY* TO DETERMINE WHETHER THAT DENIAL PREVENTED *ALL* USE. CERTIORARI IS AMPLY WARRANTED.

With a blizzard of factual minutiae, the City's Brief in Opposition seeks to becloud the straightforward issues presented by the Petition. But there are two key elements that cannot be hidden – and they are determinative.

First, the Ohio courts examined the City's permit denial and found it illegal. The trial court held the entire scheme unconstitutional. As that court put it:

> "When the Ordinance was enacted, BSW's building was considred (sic) to have no historical signifigance (sic) for the City. The area was rejected as a historical district several years earlier. The City, without notice or consent, made the building eligible for historic status. Under the Ordinance, BSW is now faced with a *million dollar renovation with no expectation of any return.*
>
> "The actions of the Landmark commission and BZA . . . have denied BSW due process and equal protection of the laws." (App., p. 68; emphasis added.)

The Court of Appeals accepted the trial court's finding of the horrendous economic burden placed by the City on BSW and agreed that the demolition permit denial was illegal. (App., pp. 58-59.) Because of the substantial costs involved, the appellate court found it unnecessary to rule on the constitutional issues. (App., pp. 57-58.)

The key here is that, until reversed in the first round of litigation, the City's ordinance froze BSW in place. It could not evade the ordinance, because the ordinance was still in force until struck down. And it could not comply with the ordinance because that would have been financially ruinous.

The City's action was illegal. The problem is legal, not factual. In the decisions brought here for review, the only issue considered below *should have been* the *amount* of compensation needed to make BSW whole for the taking that occurred while the invalidity of the ordinance was being litigated. Instead, the Ohio courts focussed on the question of whether BSW was entitled to relief at all. That was error. And that holding, as shown in the Petition, conflicts with the decisions of courts in other states on an issue that demands national uniformity because of its 5th Amendment roots.

Second, in determining whether the City had taken BSW's property, the Court of Appeals was extremely specific in what it instructed the Special Master to do. He was limited to examining one question, because the Court of Appeals believed that one question was the determinative issue in whether a temporary taking had occurred. The Court of Appeals instructed the Special Master to answer only the following query:

> "Whether the city's 1989 denial of a demolition permit deprived BSW of ***all use*** of its property." (App., p. 53; emphasis added.)

That court gave that instruction because it believed that for a temporary taking this Court required a denial of ***all use***. Plainly, that is erroneous. As the City knows,

the Special Master *should have been instructed* to determine whether the City's action denied BSW the economically viable or beneficial or productive use of its property. Just as plainly, there is conflict in the state courts on the proper standard by which to determine the existence of a temporary taking. Because of the need for national uniformity on this issue (aside from the gross injustice to BSW), this Court's attention is needed.

BSW prays that a writ of certiorari issue to review the decisions below.

Respectfully submitted,

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